REAUTHORIZATION OF THE SATELLITE HOME VIEWER IMPROVEMENT ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON COURTS, THE INTERNET, AND INTELLECTUAL PROPERTY

OF THE

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REAUTHORIZATION OF THE SATELLITE HOME VIEWER IMPROVEMENT ACT

TUESDAY, FEBRUARY 24, 2004

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON COURTS, THE INTERNET,
AND INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 4:05 p.m., in Room 2141, Rayburn House Office Building, Hon. Lamar Smith (Chair of the Subcommittee) presiding.

Mr. SMITH. The Subcommittee on Courts, the Internet, and Intellectual Property will come to order. Today's hearing is on the reauthorization of the Satellite Home Viewer Improvement Act.

I am going to recognize myself and the Ranking Member for opening statements, and then we will look forward to the testimony of our witnesses today.

The purpose of today's hearing is to assess the Satellite Home Viewer Improvement Act, SHVIA, to begin formal consideration of what changes, if any, Congress should make to this law as we evaluate how and whether to reauthorize the act.

Since its enactment in 1999, the Satellite Home Viewer Improvement Act has provided consumers greater access to broadcast network programming using their satellite dishes. Today's hearing will mark the first serious reexamination by this Congress of the many issues and interests that were involved in the enactment of the original legislation 5 years ago.

The Satellite Home Viewer Improvement Act and its predecessor, the Satellite Home Viewer Act, have clearly succeeded in helping direct broadcast satellite providers deliver multi-channel video programming to millions of American consumers.

Barely a decade old, the direct broadcast satellite industry has experienced remarkable growth. Over the last 5 years, the industry has more than doubled its number of customers and now serves in excess of 20 million households.

Although a cable company remains the largest distributor of multi-channel video programming in the U.S., two satellite providers, DirecTV and EchoStar, now serve as the second and fourth largest distributors of television programming.

While there are a number of significant provisions to the Satellite Home Viewer Improvement Act, two provisions of the law will expire on December 31, 2004, unless Congress acts to provide an extension. These provisions are known as the distant network sig-

nal compulsory license, sometimes referred to as the grade B grandfathering provision, and the copyright compulsory license.

By providing a distant network signal license, Congress intended to ensure that Americans who were not able to receive an acceptable over-the-air local network signal would have access to network programming by satellite. As part of this license, Congress agreed to grandfather certain satellite customers who had been receiving distant network signals illegally, so long as the satellite company could demonstrate that their customer was unable to receive a strong local signal.

Satellite industry proponents insist that the distant signal provision ought to be extended and that a decision not to do so could cause several hundred thousand satellite customers to lose programming they have been receiving.

Local broadcasters who serve communities with free over-the-air and digital programming believe the distant signal provision undermines the value of their licensing arrangement with networks. Further, they believe that any justification for the provision 5 years ago has been eliminated by the satellite provider's rapid rollout of local into local programming, that will soon be available by satellite delivery in all 210 U.S. Television markets.

The copyright compulsory license provision that is also due to end December 31, 2004, governs the amount and payment of compensation to copyright owners of the television programming that satellite companies retransmit to their customers.

Content providers, such as the Motion Picture Association of America, advocate letting this license expire or, alternatively, a royalty rate increase to more fully compensate them for the use of their works. Not surprisingly, the satellite industry takes the opposite tack, supporting an extension of the license and a reduction in their payments to copyright owners.

Members of this Subcommittee recognize that the use of a compulsory license is an exception to the general rule that the owner of an intellectual property right should be allowed to negotiate and receive fair value in the open market for the use of their work.

Where Government does determine that a compulsory license is in the public interest, it is imperative that its use be circumscribed and exercised only when absolutely necessary. As the original House report that accompanied the 1988 Satellite Home Viewer Act stated, these provisions sunset because of the "assumption that Congress should issue a compulsory license only when the marketplace cannot suffice."

There is no disputing that the copyright compulsory licenses that apply to the cable and satellite industries have benefited consumers, copyright owners, local stations, networks, and cable and satellite distributors. One thing that parties will dispute is the necessity of extending the compulsory licenses and the terms of those licenses.

The Subcommittee will also need to address other issues such as a request to create parity between the cable and satellite licenses, as well as a request by the satellite industry to create a so-called digital white area that would enable satellite companies to broadcast a national digital network signal to communities where no local signal exists.

As we commence this process, I am committed to the proposition that any legislation must strike an appropriate balance between the interests of intellectual property owners and the interests of those who distribute copyrighted programming.

Now, that concludes my opening statement; and I will recognize the gentleman from California, Mr. Berman, for his.

Mr. BERMAN. Thank you very much, Mr. Chairman.

Around 5 years ago, I had my first hearing as Ranking Member of this Subcommittee, involving the reauthorization of the section 119 satellite license; and a lot has changed since then but, unfortunately, a lot has stayed the same.

The changes have been, for the most part, positive. While relevant stakeholders will air a wide variety of differences today, they appear to be united in the praise of section 122, the local to local license Congress created in 1999.

Five years ago, local-into-local satellite TV service functionally didn't exist. Today, 87 percent of U.S. TV households can receive local broadcast stations via satellite. What is more, it appears most households have a choice between satellite TV providers. I understand that EchoStar provides local-into-local service to more than 83 percent of all U.S. TV households. By end of this year, DirecTV will provide local-into-local service to 92 percent of all U.S. TV households.

The current availability of local into local satellite service is a pretty dramatic development in 5 years' time. The growth in the satellite industry has been equally dramatic over the last 5 years. Satellite TV subscribership has nearly doubled in the last 5 years, from 13 million in 1999 to 22 million today.

With 25 percent of multi-channel video subscribers, satellite has become a truly formidable competitor to cable. These dramatic changes show that the Government subsidies embodied in the sections 122 and 119 licenses have conveyed tremendous benefits to satellite TV providers and to their consumers.

The situation isn't so bright for those on whose backs these subsidies are levied. For copyright owners, much remains unhappily the same. Royalties paid under the section 119 license for retransmission of distant broadcast signals have remained frozen for 5 years. In fact, they have remained frozen at deep discounts to 1999 marketplace rates.

The statutory inflexibility of these rates is unique and uniquely unfair. Virtually every other compulsory license that requires royalty payments includes a mechanism for increasing those payments.

Furthermore, the inflexibility of section 119 rates is totally inconsistent with marketplace realities. In voluntary negotiations over the past 5 years, satellite TV providers have agreed to provide markedly increased compensation to owners of copyrights in non-broadcast programming.

If the section 119 is to be reauthorized, and it appears a virtual certainty it will be, owners of copyrighted broadcast programming should be more fairly compensated.

In another example of how things remain the same, some satellite subscribers continue to receive a distant signal of a broadcast

station despite the fact that they now receive a local signal of that broadcast via satellite.

During our hearing nearly 5 years ago, I noted that such situations might arise and wondered whether there was any justification for allowing them to exist. I continue to believe that compulsory licenses, including the section 119 license, should only count against the minimal abrogation of copyright in order to accomplish their goals. If a satellite subscriber can receive a local broadcast via satellite, there appears to be no justification for abrogating copyright protection in order to provide that subscriber with a distant signal under the section 119 license.

While some of the problems we face today are identical to those we discussed 5 years ago, our witnesses will identify many entirely new issues.

One issue of particular concern to me is the two-dish system in play by EchoStar. I understand that EchoStar relegates certain stations, like Univision, to a second dish, which may violate the requirement that it carry all stations in a non-discriminatory manner.

Another new issue involves subscribers in one State who, due to the vagaries of the DMA definition, receive their local broadcast signal from another State. And there is the issue whether the grade B signal intensity standard will be useless in a future world of all-digital broadcasts. I don't mean to opine here and now on the appropriate resolution of these new issues. This hearing is only the first step in educating ourselves about them.

However, I do believe the emergence of these new issues indicates the wisdom of reauthorizing section 119 on a temporary basis. New problems with the satellite licenses are bound to come up again; and, as it does today, the looming expiration of the 119 license gives us an opportunity to address them.

Thank you, Mr. Chairman.

Mr. SMITH. Thank you Mr. Berman.

Our first witness is the Honorable Marybeth Peters, who has served as Register of Copyrights since August 1994. Prior to assuming this office, Ms. Peters served as the Policy Planning Adviser to the Register Acting General Counsel of the Copyright Office and as Chief of both the Examining and Information Reference Divisions.

As the Register of Copyrights, Ms. Peters is a frequent witness before our Subcommittee. Her duties require her to administer the copyright law, prepare technical studies, provide advice to Congress, and draft legislation. Ms. Peters received her law degree from the George Washington University Law School. She received her undergraduate degree from Rhode Island College.

Our second witness is Fritz Attaway, the Executive Vice President for Government Relations and Washington General Counsel for the Motion Picture Association of America, who he is representing today.

Mr. Attaway has served MPAA and its member companies since 1976. Currently, his responsibilities include the direction of all Federal public policy activities of the Association, including congressional and Federal Agency affairs. In addition, he participates

in the management of world-wide public policy interests for the Association.

Mr. Attaway is a graduate of The College of Idaho where he received a B.A. in political science and business administration. He received his J.D. From the University of Chicago.

Our third witness is David K. Moskowitz, who is the Senior Vice President and General Counsel For EchoStar Communications Corporation, a satellite distributor that serves over nine million subscribers. He is the current chairman of the Satellite Broadcasting and Communications Association, an organization that represents the satellite service industry; and he testifies on their behalf.

Mr. Moskowitz received his J.D. From the George Washington University Law School and his B.A. From Western Maryland College.

Our final witness is Robert G. Lee, President and General Manager of WDBJ Television, a CBS affiliate that, according to Nielsen, is the leading station in the Roanoke/Lynchburg, Virginia, market.

Mr. Lee also serves as chairman of the CBS Television Network Affiliates Association, an organization that advocates the interests of nearly 200 local community-based CBS affiliates.

Mr. Lee's testimony will be presented on behalf of the National Association of Broadcasters, an organization whose principal goal is to represent the interests of free over-the-air radio and television broadcasters.

Welcome to you all. I thank you for participating in today's hearing. Without objection, your written testimony will be made a part of the record; and again we look forward to your comments.

Mr. SMITH. We will start with Ms. Peters.

STATEMENT OF THE HONORABLE MARYBETH PETERS, REGISTER OF COPYRIGHTS, COPYRIGHT OFFICE OF THE UNITED STATES, THE LIBRARY OF CONGRESS

Ms. PETERS. Mr. Chairman, Mr. Berman, Mr. Boucher, I am pleased to appear before you today to testify on the extension or reauthorization of the satellite carrier section 119 statutory license. Statutory licenses represent a complex, detailed area of the law.

In my written testimony, I have laid out the history and operation of the statutory licenses dealing with the retransmission of local and distant over-the-air broadcast signal by cable operators, section 111, the section 122 local, and the section 119 distant statutory licenses covering the retransmission of over-the-air broadcast signals by satellite carriers.

Today, the focus is on section 119, which is scheduled to expire at the end of this year. The question is, should this license be allowed to expire?

The Office faced this question in 1994 and again in 1999. Our position remains the same. In principle, the Copyright Office disfavors statutory licenses. A statutory license should be a last resort. We favor marketplace solutions.

Having said that, the cable compulsory license has been part of the law since 1978. It is not scheduled for elimination. Believing in parity among providers, the Office supports reauthorization of the section 119 license for satellite carriers.

While I believe that, in principle, the satellite license should continue for as long as the cable license is in place, the written testimony of other participants in this hearing has persuaded me that we are in an area and a period of transition. Issues such as transition from analog to digital broadcast and the projected expansion of local-into-local service to virtually all households that in only a few years from now will make it necessary to reexamine the terms and conditions of the satellite license. Therefore, at this point, I would favor a 5-year extension of the section 119 license.

I recommend that, during this 5-year period, issues relating to digital technology and the impact of other changes that affect the license be examined. During that 5-year period, the section 111 cable operator license should also be subject to the same examination, because many of the same issues will affect the cable industry as well.

As I stated in my 1997 report to the Chairman of the Senate Committee on the Judiciary, the cable and satellite licenses should, where possible, be harmonized to avoid unduly affecting the competitive balance between the industries.

During this legislative session, this Subcommittee should, however, consider several amendments to the section 119 license.

First, several existing provisions should be removed. They are the provision concerning the public broadcasting satellite feed which expired on January 1 of 2002; second, the provisions related to the copyright arbitration royalty panel proceeding to adjust the rates, which was concluded in 1997 and which was superseded by the 1999 extension; and, last, the provision establishing an interim home subscriber testing regime for satellite service of network signals, which expired in 1996.

Second, with respect to distant signals, the Office believes Congress will have to reexamine how to determine what is an unserved household; that is, a household that cannot receive an adequate network signal as a transition from digital to analog broadcast takes place.

The time will come when television stations broadcast only digital signals, and as analog signals become a thing of the past, the current unserved household definition based on reception of a signal of grade B intensity will become irrelevant. As you consider the reauthorization of the section 119 license, you will need to determine whether that issue needs to be addressed now or whether it can wait.

A related issue has been identified in the testimony of the National Association of Broadcasters. Should a satellite carrier be permitted to transmit a distant network signal to a household that cannot receive an acceptable over-the-air signal, but that can receive the local network affiliate signal from the satellite carrier using the section 122 statutory license?

I am inclined to believe that there is no justification for permitting delivery of the distant signal under those circumstances.

We look forward to working with you, Mr. Chairman and Members of the Subcommittee, as well as staff, to resolve these and other matters involving the reauthorization of section 119.

Thank you.

Mr. SMITH. Thank you, Ms. Peters.

[The prepared statement of Ms. Peters follows:]

PREPARED STATEMENT OF MARYBETH PETERS

Mr. Chairman, Mr. Berman, and distinguished members of the Subcommittee, I appreciate the opportunity to appear before you to testify on the extension of the Satellite Home Viewer Improvement Act of 1999 and the statutory license contained in section 119 of the Copyright Act. As you know, the section 119 license enables satellite carriers to retransmit over-the-air television broadcast stations to their subscribers for private home viewing upon semi-annual payment of royalty fees to the Copyright Office. Since its enactment in 1988, the Office has collected over $500 million in royalties and distributed them to copyright owners of the over-the-air television broadcast programming retransmitted by satellite carriers. The section 119 license, along with its counterpart for the cable television industry, the section 111 license, have provided *the* means for licensing copyrighted works to broadcast programming in the television retransmission marketplace.

BACKGROUND

There are currently three statutory licenses in the Copyright Act, title 17 of the United States Code, governing the retransmission of over-the-air broadcast signals. A statutory copyright license is a codified licensing scheme whereby copyright owners are required to license their works to a specified class of users at a government-fixed price and under government-set terms and conditions. There is one statutory license applicable to cable television systems and two statutory licenses applicable to satellite carriers. The cable statutory license, 17 U.S.C. § 111, allows a cable system to retransmit both local and distant over-the-air radio and television broadcast stations to its subscribers who pay a fee for such service. The satellite carrier statutory license in section 119 of the Copyright Act, 17 U.S.C. § 119, permits a satellite carrier to retransmit distant over-the-air television broadcast stations (but not radio stations) to its subscribers for private home viewing, while the statutory license in section 122 permits satellite carriers to retransmit local over-the-air television broadcast stations (but not radio) stations to its subscribers for commercial and private home viewing. The section 111 cable license and the section 122 satellite license are permanent. The section 119 satellite license, however, will expire at the end of this year.

It is difficult to appreciate the reasons for and issues relating to the satellite license without first understanding the cable license that preceded it. Therefore, I will describe the background of the cable license before addressing the satellite license.

1. The section 111 cable statutory license.

The cable statutory license, enacted as part of the Copyright Act of 1976, applies to any cable televison system that carries over-the-air radio and television broadcast signals in accordance with the rules and regulations of the Federal Communications Commission (FCC). These systems are required to submit royalties for carriage of their signals on a semi-annual basis in accordance with prescribed statutory royalty rates. The royalties are submitted to the Copyright Office, along with a statement of account reflecting the number and identity of the over-the-air broadcast signals carried, the gross receipts from subscribers for those signals, and other relevant filing information. The Copyright Office deposits the collected funds in interest-bearing accounts with the United States Treasury for later distribution to copyright owners of the over-the-air broadcast programming through the procedure described in chapter 8 of the Copyright Act.

The development of the cable television industry in the second half of the twentieth century presented unique copyright licensing concerns. Cable operators typically carried multiple over-the-air broadcast signals containing programming owned by scores of copyright owners. It was not realistic for cable operators to negotiate individual licenses with numerous copyright owners and a practical mechanism for clearing rights was needed. As a result, Congress created a statutory copyright license for cable systems to retransmit over-the-air broadcast signals. The structure of the cable statutory license was premised on two prominent congressional considerations: first, the perceived need to differentiate between the impact on copyright owners of local versus distant over-the-air broadcast signals carried by cable operators; and, second, the need to categorize cable systems by size based upon the dollar amount of receipts a system receives from subscribers for the carriage of broadcast signals. These two considerations played a significant role in evaluating what economic effect cable systems have on the value of copyrighted works shown on over-the-air broadcast stations. Congress concluded that a cable operator's carriage of

local over-the-air broadcast signals did not affect the value of the copyrighted works broadcast because the signal is already available to the public for free through over-the-air broadcasting. Therefore, the cable statutory license essentially allows cable systems to carry local signals for free. [1] Congress also determined that distant signals do affect the value of copyrighted over-the-air broadcast programming because the programming is reaching larger audiences. The increased viewership is not compensated because local advertisers, who provide the principal remuneration to broadcasters enabling broadcasters to pay for programming, are not willing to pay increased advertising rates for cable viewers in distant markets who cannot be reasonably expected to purchase their goods. As a result, broadcasters have no reason or incentive to pay greater sums to compensate copyright owners for the receipt of their signals by distant viewers on cable systems. The classification of a cable system by size, based on the income from its subscribers, assumes that only the larger systems which import distant signals have any significant economic impact on copyrighted works.

The royalty payment scheme for the section 111 license is complicated. It stands in sharp contrast to the royalty payment scheme for the section 119 satellite carrier license which uses a straightforward flat rate payment mechanism. To better understand the marked differences between the two licenses, it is necessary to explain how royalties are paid under the section 111 cable license.

Section 111 distinguishes among three sizes of cable systems according to the amount of money a system receives from subscribers for the carriage of broadcast signals. The first two classifications are small to medium-sized cable systems—Form SA–1's and Form SA–2's—named after the statement of account forms provided by the Copyright Office. Semiannually, Form SA–1's pay a flat rate (currently $37) for carriage of all local and distant over-the-air broadcast signals, while Form SA–2's pay a fixed percentage of gross receipts received from subscribers for carriage of broadcast signals irrespective of the number of distant signals they carry. The large systems, Form SA–3's, pay in accordance with a highly complex and technical formula, based in large part on regulations adopted by the FCC that governed the operation of cable systems in 1976, the year that section 111 was enacted. This formula requires systems to distinguish between carriage of local and distant signals and to pay accordingly. The vast majority of royalties paid under the cable statutory license come from Form SA–3 systems.

The royalty scheme for Form SA–3 systems employs the statutory device of the distant signal equivalent (DSE). Distant over-the-air broadcast stations are determined in accordance with two sets of FCC regulations: the "must-carry" rules for over-the-air broadcast stations in effect on April 15, 1976, and a station's television market as currently defined by the FCC. A signal is distant for a particular cable system when that system would not have been required to carry the station under the FCC's must-carry rules, and the system is not located within the station's local television market.

Cable systems pay for carriage of distant signals based upon the number of distant signal equivalents (DSE's) they carry. The statute defines a DSE as "the value assigned to the secondary transmission of any nonnetwork television programming carried by a cable system in whole or in part beyond the local service area of a primary transmitter of such programming." 17 U.S.C. § 111(f). A DSE is computed by assigning a value of one to a distant independent over-the-air broadcast station, and a value of one-quarter to distant noncommercial educational and network stations, which have a certain amount of nonnetwork programming in their broadcast days. A cable system pays royalties based upon a sliding scale of percentages of its gross receipts depending upon the number of DSE's it carries. The greater the number of DSE's, the higher the total percentage of gross receipts and, consequently, the larger the total royalty payment.

As noted above, operation of the cable statutory license is intricately linked with how the FCC regulated the cable industry in 1976. The FCC regulated cable systems extensively, limiting them in the number of distant signals they could carry (the distant signal carriage rules), and requiring them to black-out programming on a distant signal where a local broadcaster had purchased the exclusive rights to that same programming (the syndicated exclusivity rules). In 1980, the FCC deregulated the cable industry and eliminated both the distant signal carriage and syndicated exclusivity ("syndex") rules. Cable systems were now free to import as many distant signals as they desired.

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[1] It should be noted, however, that cable systems that carry only local signals and no distant signals (a rarity) are still required to submit a statement of account and pay a basic minimum royalty fee. All cable systems must pay at least a minimum fee for the privilege of using the section 111 license.

The Copyright Royalty Tribunal, pursuant to its statutory authority, and in reaction to the FCC's deregulation, conducted a rate adjustment proceeding for the cable statutory license to compensate copyright owners for the loss of the distant signal carriage and the syndex rules. This rate adjustment proceeding established two new rates applicable only to Form SA–3 systems. 47 Fed. Reg. 52,146 (1982). The first new rate, to compensate for the loss of the distant signal carriage rules, was the adoption of a royalty fee of 3.75% of a cable system's gross receipts from subscribers, for over-the-air broadcast programming for carriage of each distant signal that would not have previously been permitted under the former distant signal carriage rules.

The second rate, adopted by the Copyright Royalty Tribunal to compensate for the loss of the syndex rules, is known as the syndex surcharge. Form SA–3 cable systems must pay this additional fee when the programming appearing on a distant signal imported by the cable system would have been subject to black-out protection under the FCC's former syndex rules. [2]

Since the Tribunal's action in 1982, the royalties collected from cable systems have been divided into three categories to reflect their origin: 1) the "Basic Fund," which includes all royalties collected from Form SA–1 and Form SA–2 systems, and the royalties collected from Form SA–3 systems for the carriage of distant signals that would have been permitted under the FCC's former distant carriage rules; 2) the "3.75% Fund," which includes royalties collected from Form SA–3 systems for distant signals whose carriage would not have been permitted under the FCC's former distant signal carriage rules; and 3) the "Syndex Fund," which includes royalties collected from Form SA–3 systems for carriage of distant signals containing programming that would have been subject to black-out protection under the FCC's former syndex rules.

In order to be eligible for a distribution of royalties, a copyright owner of over-the-air broadcast programming retransmitted by one or more cable systems on a distant basis must submit a written claim to the Copyright Office. Only copyright owners of nonnetwork over-the-air broadcast programming are eligible for a royalty distribution. Eligible copyright owners must submit their claims in July for royalties collected from cable systems during the previous year. Once claims have been processed, the Librarian of Congress determines whether there are controversies among the parties filing claims as to the proper division of the royalties. If there are no controversies—meaning that the claimants have settled among themselves as to the amount of royalties each claimant is due—then the Librarian distributes the royalties in accordance with the claimants' agreement(s) and the proceeding is concluded. The Librarian must initiate a Copyright Arbitration Royalty Panel (CARP) proceeding in accordance with the provisions of chapter 8 of the Copyright Act for those claimants who do not agree.

The section 111 statutory license is not the only means for licensing programming on over-the-air broadcast stations. Copyright owners and cable operators are free to enter into private licensing agreements for the retransmission of over-the-air broadcast programming. Private licensing most frequently occurs in the context of particular sporting events, where a cable operator wishes to retransmit a sporting event carried on a distant broadcast station, but does not wish to carry the station on a full-time basis. [3] The practice of private licensing is not widespread and most cable operators rely exclusively on the cable statutory license to clear the rights to over-the-air broadcast programming.

2. The section 119 satellite carrier statutory license.

The cable statutory license was enacted as part of the Copyright Act of 1976 and is a permanent license. In the mid-1980's, the home satellite dish industry grew significantly, and satellite carriers had the ability to retransmit over-the-air broadcast programming to home dish owners. In order to facilitate this business and provide rural America with access to television programming, Congress passed the Satellite Home Viewer Act of 1988, Pub. L. No. 100–667 (1988), which created the satellite carrier statutory license found in 17 U.S.C. § 119.

The section 119 license is similar to the cable statutory license in that it provides a means for satellite carriers to clear the rights to over-the-air television broadcast programming (but not radio) upon semi-annual payment of royalty fees to the Copyright Office. The section 119 license differs from the cable statutory license, how-

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[2] Royalties collected from the syndex surcharge later decreased considerably when the FCC reimposed syndicated exclusivity protection in certain circumstances.

[3] Under the cable statutory license, a cable operator that carries any part of an over-the-air broadcast signal, no matter how momentary, must pay royalties for the signal as if it had been carried for the full six months of the accounting period.

ever, in several important aspects. First, the section 119 license was enacted to cover only distant over-the-air television broadcast signals. In 1988, and for many years thereafter, satellite carriers lacked the technical ability to deliver subscribers their local television stations. Local signals are not covered by the section 119 license. Second, the calculation of royalty fees under the section 119 license is significantly different from the cable statutory license. Rather than determine royalties based upon the complicated formula of gross receipts and application of outdated FCC rules, royalties under the section 119 license are calculated on a flat, per subscriber per signal basis. Over-the-air broadcast stations are divided into two categories: superstation signals (i.e., commercial independent over-the-air television broadcast stations), and network signals (i.e., commercial televison network stations and noncommercial educational stations); each with its own attendant royalty rates. Satellite carriers multiply the respective royalty rate for each signal by the number of subscribers who receive the signal during the six-month accounting period to calculate their total royalty payment.

Third, while satellite carriers may use the section 119 license to retransmit superstation signals to subscribers located anywhere in the United States, they can retransmit only network signals to subscribers who reside in "unserved households." An unserved household is defined as one that cannot receive an over-the-air signal of Grade B intensity of a network station using a conventional rooftop antenna. 17 U.S.C. § 119(d).[4] The purpose of the unserved household limitation is to protect local network broadcasters whose station is not provided by a satellite carrier from having their viewers watch another affiliate of the same network on their satellite television service, rather than the local network affiliate.

The section 119 satellite carrier statutory license created by the Satellite Home Viewer Act of 1988 was scheduled to expire at the end of 1994 at which time satellite carriers were expected to be able to license the rights to all over-the-air broadcast programming that they retransmitted to their subscribers. However, in 1994 Congress reauthorized the section 119 license for an additional five years. In order to assist the process of ultimately eliminating the section 119 license, Congress provided for a Copyright Arbitration Royalty Panel (CARP) proceeding to adjust the royalty rates paid by satellite carriers for network stations and superstations. Unlike cable systems which pay fixed royalty rates adjusted only for inflation, Congress mandated that satellite carrier rates should be adjusted to reflect marketplace value. It was thought that by compelling satellite carriers to pay statutory royalty rates that equaled the rates they would most likely pay in the open marketplace, there would be no need to further renew the section 119 license and it could expire in 1999.

The period from 1994 to 1999 was the most tumultuous in the history of the section 119 license. The satellite industry expanded its subscriber base considerably during this time and provided many of these subscribers with network stations in violation of the unserved household limitation. Broadcasters issued challenges, lawsuits were brought, and many satellite customers had their network service terminated. Angry subscribers wrote their congressmen and senators protesting the loss of their satellite-delivered network stations, focusing attention on the fairness and application of the unserved household limitation. In the meantime, the Library of Congress conducted a CARP proceeding to adjust the royalty rates paid by satellite carriers. Applying the new marketplace value standard as it was required to do, the CARP not surprisingly raised the rates considerably. The satellite industry, with less than 10 million subscribers, was required to pay more in statutory royalty fees than the cable industry, which had nine times the number of subscribers. The satellite industry and its customers were irate.

Congress's response to the furor over the section 119 license was the Satellite Home Viewer Improvement Act of 1999. The Act codified a new vision for the statutory licensing of the retransmission of over-the-air broadcast signals by satellite carriers. The heart of the conflict over the unserved household limitation—indeed the reason for its creation—was the inability of satellite carriers (unlike cable operators) early on to provide their subscribers with their local television stations. By 1999, satellite carriers were beginning to implement local service in some of the major television markets in the United States. In order to further encourage this development, Congress created a new, royalty-free license.[5] Congress also made several changes to the unserved household limitation itself. The FCC was directed to con-

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[4] Certain exemptions to the unserved household limitation were added by the Satellite Home Viewer Improvement Act of 1999, including recreational vehicles and commercial trucks, certain grandfathered subscribers, subscribers with outdated C-band satellite dishes and subscribers obtaining waivers from local network broadcasters.

[5] The section 122 statutory license is discussed infra.

duct a rulemaking to set specific standards whereby a satellite subscriber's eligibility to receive service of a network station could accurately be predicted.[6] For those subscribers that were not eligible for network service, a process was codified whereby they could seek a waiver of the unserved household limitation from their local network broadcaster. In addition, three categories of subscribers were exempted from the unserved household limitation: owners of recreational vehicles and commercial trucks, provided that they supplied certain required documentation; subscribers receiving network service which was terminated after July 11, 1998, but before October 31, 1999, and did not receive a strong (Grade A) over-the-air signal from their local network broadcaster; and subscribers using the old-style large C-band satellite dishes.

In reaction to complaints about the 1997 CARP proceeding that raised the section 119 royalty rates, Congress abandoned the concept of marketplace value royalty rates and reduced the CARP-established royalty fee for network stations by 45 percent and the royalty fee for superstations by 30 percent. Finally, the Satellite Home Viewer Improvement Act of 1999 extended the revised section 119 statutory license for five years until midnight on December 31 of this year.

3. The section 122 satellite carrier statutory license.

The section 122 satellite carrier statutory license completes the regime for satellite retransmission of over-the-air television broadcast stations. While the section 111 license permits cable systems to retransmit both local and distant over-the-air television broadcast signals, such a privilege is parsed among two statutory licenses for the satellite industry. As discussed above, the section 119 license covers retransmissions of distant signals. The section 122 license covers the retransmission of local signals and, unlike the section 119 license, is permanent. The section 122 license is royalty free, and is conditioned on a satellite carrier carrying all local over-the-air television stations within a given market. In other words, a satellite carrier may not pick and choose which stations in a given local market it wishes to provide to its subscribers residing in that market.

SHOULD THE SECTION 119 LICENSE BE EXTENDED?

The Copyright Office has traditionally opposed statutory licensing for copyrighted works, preferring instead that licensing be determined in the marketplace by copyright owners through the exercise of their exclusive rights. However, in my report to the Senate and House Judiciary Committees before to the passage of the Satellite Home Viewer Improvement Act of 1999, I stated that "the satellite carrier industry should have a compulsory [statutory] license to retransmit broadcast signals as long at the cable industry has one." *A Review of the Copyright Licensing Regimes Covering Retransmission of Broadcast Signals* (Report of the Register of Copyrights, August 1, 1997) at 33. Nothing has changed since 1997 to alter this point of view, and I can think of no reason that would justify retaining the section 111 cable statutory license while abandoning the section 119 satellite carrier statutory license. Consequently, the Copyright Office supports extension of section 119.

SHOULD THERE BE OTHER AMENDMENTS TO THE SECTION 119 LICENSE?

Today's hearing marks the start of a process whereby this Subcommittee will be presented with many ideas for changes to the existing terms and conditions of the section 119 license. We look forward to working with you, Mr. Chairman, and, if requested, will offer our analysis and views on any proposed amendments to section 119. However, I would like to call your attention to two issues.

First, there are some outdated provisions in section 119. Specifically, there are provisions governing the licensing of the PBS satellite feed which expired in 2003. There are also a number of provisions regarding the 1997 Copyright Arbitration Royalty Panel (CARP) rate adjustment. The rates established by that proceeding were superseded by the Satellite Home Viewer Improvement Act of 1999 and are no longer relevant. Further, the Grade B signal testing regime, created by the Satellite Home Viewer Act of 1994, expired in 1996. These outdated sections should be deleted from section 119.

Second, there are matters related to the transition by the broadcast industry from over-the-air analog television signals to digital signals. The FCC has directed that

[6] The Commission confirmed that the Grade B signal intensity standard provided an adequate television picture when received with a conventional rooftop receiving antenna, and adopted a predictive model to determine when subscribers likely received an over-the-air signal of Grade B intensity. *Report,* 15 FCC Rcd 24321 (Nov. 29, 2000)(Grade B intensity); *First Report and Order*, 15 FCC Rcd 12118 (May 26, 2000)(predictive model).

the conversion to digital should take place by 2006. While this date may ultimately change, the conversion to digital nonetheless raises some questions with respect to statutory licensing. The Copyright Office strongly supports a formal Congressional recognition that the section 119 license, and the section 122 license, apply to satellite carriers of over-the-air digital broadcast television stations. In so recognizing this application, it will be necessary to address the unserved household limitation set forth in the section 119 license.

As described earlier in this testimony, the unserved household limitation restricts satellite carriers from making use of the section 119 license for network television stations to subscribers that do not reside in unserved households. An "unserved household" is defined as one that "cannot receive, through the use of a conventional, stationary, outdoor rooftop receiving antenna, an over-the-air signal of a primary network station affiliated with that network of Grade B intensity as defined by the Federal Communications Commission. . . ." 17 U.S.C. § 119(d)(10)(A). The Grade B standard applies to television stations that broadcast in analog format, not digital. Consequently, there will be no standard to determine when a household receives an adequate over-the-air signal of a network station that is broadcast in digital. The unserved household limitation will not function in the era of digital television unless it is amended.

It is reasonable to assume that a new signal strength standard for digital broadcasting might mirror the Grade B standard applicable to analog broadcasting. In establishing a new standard, I offer a word of caution. A television signal of Grade B intensity received by a household does not always guarantee a perfect television picture, but it virtually always guarantees a watchable picture. Atmospheric conditions, terrain features and background noise can sometimes make an analog television picture fuzzy or snowy, but there is still a receivable signal. Such is not the case, however, with digital broadcasting, which is an all or nothing proposition. If a digital signal is too weak at any given time, the household will not receive a fuzzy or snowy picture; it will receive nothing. Therefore, the signal intensity strength standard for digital television must be sufficiently strong to assure that a household receiving an over-the-air digital broadcast station can receive it twenty-four hours a day, seven days a week.

We look forward to working with you, Mr. Chairman and members of the Subcommittee, to resolve these and other matters regarding the extension of the section 119 license. Thank you.

Mr. SMITH. Mr. Attaway.

STATEMENT OF FRITZ ATTAWAY, EXECUTIVE VICE PRESIDENT FOR GOVERNMENT RELATIONS AND WASHINGTON GENERAL COUNSEL, MOTION PICTURE ASSOCIATION OF AMERICA (MPAA)

Mr. ATTAWAY. Thank you, Chairman Smith, Mr. Berman, Mr. Boucher, Mr. Meehan.

I appreciate this opportunity today to present the views of television content owners on extension of the Satellite Home Viewer Act. Although I speak today only on behalf of the member companies of the Motion Picture Association, I am authorized to tell you that my statement is endorsed by the Office of the Commissioner of Baseball, the National Football League, the National Basketball Association, the National Hockey League, the National Collegiate Athletic Association, and Broadcast Music, Inc.

The Satellite Home Viewer Act of 1988 created in section 119 of the Copyright Act, for a 5-year period, a compulsory license that allows satellite program distributors, such as EchoStar and DirecTV, to retransmit broadcast television programming from distant markets without the permission of copyright owners of that programming. This satellite compulsory license forces copyright owners to make their copyrighted programs available without their consent and without any ability to negotiate with the satellite companies for, among other things, marketplace compensation.

The SHVA was extended for 5-year periods in 1994 and 1999. In 1999, in response to fierce lobbying by the satellite industry, Congress imposed a substantial discount on market-based compulsory license rates set a year earlier by an independent arbitration panel and approved by the Copyright Office and the Librarian of Congress. These discounts, 30 percent for superstation programming and 45 percent for network and PBS programming, went into effect in July 1999.

Since the reduction in royalty rates in 1999, there have been no further adjustments to the compulsory license rates.

In the 5 years since the last extension of the satellite compulsory license, the cost of programming that satellite companies license in the free market for resale to their subscribers has increased substantially, as have the fees charged by satellite companies to their subscribers. The only financial figure that has not increased is the compensation provided to owners of retransmitted broadcast programming.

Satellite carriers now pay only 18.9 cents per subscriber per month for all the programming on a distant independent broadcast station like WGN in Chicago and KTLA in Los Angeles. They pay only 14.85 cents for network stations. The satellite carriers then sell this programming to their subscribers for many times that amount.

Let me put this in perspective. This bag of pinto beans cost $0.69 at the Safeway store. A satellite carrier, under the Government-imposed compulsory license, pays 18.9 cents a month for movies, series, sporting events, local news shows, and other programming broadcast 24 hours a day.

Mr. Chairman, it is a fact that, for all of this programming, which costs millions of dollars to produce, satellite carriers don't pay beans.

Mr. SMITH. I thought that phrase was coming myself, yes.

Mr. ATTAWAY. The landscape has changed dramatically since the first satellite compulsory license was enacted in 1988. It has been 14 years. It is time for Congress to reexamine the need for a wealth transfer from content owners to satellite carriers. At the very least, Congress should demand from proponents of the satellite compulsory license clear and convincing evidence that an extension of the license is necessary to serve the public interest.

These carriers provide hundreds of channels of programming for which they negotiate in the free market. It is only this handful of distant broadcast stations that use a compulsory license. There is no justification for that in my mind. But if you decide to continue to subsidize the satellite industry, I urge you to provide some semblance of fairness to the content owners who pay for this subsidy, by making three changes in law.

First, the royalty rates for the year 2004 should be increased to reflect increases that satellite companies have paid in the marketplace for comparable programming; second, starting in 2005, the royalty rates should be adjusted annually to keep pace with the license fees paid by satellite companies in the free market for comparable programming; and, third, copyright owners should have the right to audit satellite companies to ensure that they are accurately reporting and paying their royalties.

Mr. Chairman, these are not radical changes. They are reasonable. They would inject some degree of fairness in the compulsory license by bringing compensation to program owners closer to market levels.

I respectfully urge the Committee to make these changes if it decides to extend the compulsory license, and thank you very much for your time.

Mr. SMITH. Thank you, Mr. Attaway.

[The prepared statement of Mr. Attaway follows:]

PREPARED STATEMENT OF FRITZ ATTAWAY

Chairman Smith, ranking minority member Berman, members of the Subcommittee, thank you for giving me this opportunity to present the views of owners of television programming, and representatives of authors whose works appear in that programming, on extension of the Satellite Home Viewer Act. Although I speak only for the member companies of the Motion Picture Association of America, I am authorized to tell you that the following organizations endorse the views set forth in this statement: the Office of the Commissioner of Baseball, the National Football League, the National Basketball Association, the National Hockey League, the National Collegiate Athletic Association, and Broadcast Music, Inc.

BACKGROUND

The Satellite Home Viewer Act (SHVA) of 1988 created in Section 119 of the Copyright Act, for a five-year period, a "compulsory license" that allows satellite program distributors (such as EchoStar and DirecTV) to retransmit broadcast television programming from distant markets without the permission of the copyright owners of that programming. This satellite compulsory license forces copyright owners to make their copyrighted programs available without their consent and without any ability to negotiate with the satellite companies for, among other things, marketplace compensation.

The SHVA was extended for five-year periods in 1994 and 1999. The 1994 renewal provided for a royalty rate adjustment procedure aimed at providing copyright owners with market value compensation for the use of their programming by satellite companies. This procedure was in fact exercised, which resulted in the assessment of market-based royalty rates in 1998 by a panel of independent arbitrators appointed by the Copyright Office.

Although satellite companies pay market based license fees for scores of program services that they sell to their subscribers, they strongly objected to paying market based royalty rates for the retransmitted broadcast programming they sell to their subscribers, and successfully petitioned Congress to impose a substantial discount on the market based rates. These discounts—30 percent for "superstation" programming and 45 percent for network and PBS programming—went into effect in July of 1999.

Since the *reduction* of royalty rates in 1999, there have been no further adjustments to the compulsory license rates. If the SHVA were simply extended for another five years, at the end of that period the satellite royalty rates will have been frozen for a period of *ten years*. In the five years since the last extension of the satellite compulsory license, the cost of programming that satellite companies license in the free market for resale to their subscribers has increased substantially, as have the fees charged by satellite companies to their subscribers. The only fiscal measure that has not increased is the compensation provided owners of retransmitted broadcast programming.

COPYRIGHT OWNERS' POSITION

1. Compulsory licenses are a serious derogation of the rights of copyright owners. They substitute the heavy hand of government for the efficient operation of the marketplace and arbitrarily transfer wealth from copyright owners to privileged users. Compulsory licenses should be imposed only as a last resort when marketplace forces clearly are incapable of operating in the public interest. It has been 14 years since the satellite compulsory license was first imposed. Congress should demand from proponents of the satellite compulsory license clear and convincing evidence that an extension of the license is necessary to serve the public interest.

2. If Congress reauthorizes the satellite compulsory license, the royalty rates for the year 2004 should be increased to reflect increases that satellite companies have paid in the marketplace for comparable programming.
3. Starting in 2005, the royalty rates should be adjusted annually to keep pace with the license fees paid by satellite companies in the free market for comparable programming services.
4. Copyright owners should have the right to audit satellite companies to ensure that they are accurately reporting and paying their royalties.

BASES FOR COPYRIGHT OWNERS' POSITION

There is no equitable justification for freezing the satellite compulsory license royalty rates for a period of ten years.

- *The rate freeze that has been in effect since 1999 is unique among the compulsory licenses.* All of the other compulsory licenses in the Copyright Act have procedures for increasing the royalty rates, either automatically or through rate adjustment proceedings. Satellite companies have unjustifiably received special treatment by not having their royalty rates subject to periodic adjustments.
- *Satellite companies themselves have raised the prices that consumers pay to receive distant broadcast signals.* For example, according to the web site "Echostar Knowledge Base," which states that it is not affiliated with Echostar Communications, the EchoStar satellite service raised the monthly price of its package of distant "superstation" signals from $4.99 per subscriber in 1998 to $5.99 in 2002—despite the fact that the royalty cost of distant signal programming was *reduced* by Congress in 1999. In other words, since 1998 this satellite service has *increased* its charges for distant broadcast programming by 20 percent, while its copyright royalty payment for that programming has been *reduced* by 30 percent!! Copyright owners of retransmitted broadcast programming should not be forced to accept freezes in the satellite compulsory license royalty rates when all other costs to satellite carriers are increasing and the fees charged by satellite carriers to their subscribers are increasing as well.
- *The fees that satellite companies pay for comparable programming not subject to compulsory licensing have steadily increased.* For example, in 1998, a panel of independent arbitrators determined that broadcast programming transmitted pursuant to the satellite compulsory license was most comparable to the programming on the 12 most widely carried cable networks, such as TNT, CNN, ESPN, USA and Nickelodeon. The license fees for those twelve networks have increased by approximately 60 percent since 1998. A report issued by the General Accounting Office last year found that cable and satellite service programming costs had risen 34 percent in the previous three years. These increases reflect substantial increases in the production costs of entertainment programming. For instance, the average production cost of network half-hour sitcoms increased from $994,000 to $1,227,000 per episode, or 23.4 percent, between 2000 and 2003 alone.
- *There is well-established precedent for allowing copyright owners some royalty rate increases over the years.* When Congress first extended the satellite compulsory license in 1994, it adopted rates that represented an increase over the rates in the original satellite compulsory license, and provided a mechanism for adjusting those rates in the future to reflect the market value of programming. In the 1999 extension legislation, Congress again adopted rates that represented an increase over those put in place in 1994, even though those rates were less than those that were set by an independent arbitration panel.

Annual adjustments should be built into the royalty rates so that those rates reflect increases in payments for programming made by satellite companies in the free market.

- *A provision to allow annual royalty rate adjustments will eliminate the unfairness of discriminatory rate freezes for long periods of time.* Building in annual rate adjustments tied to an objective marketplace benchmark will ensure some measure of fair compensation to copyright owners over the life of the compulsory license.
- *Periodic royalty fee adjustments will simplify the royalty rate process.* With a built-in annual adjustment based on a known benchmark, there will be less potential for dramatic rate changes necessary to make up for long periods

without adjustments and greater certainty for copyright owners and satellite companies as well.

- *Other compulsory licenses have provisions for periodic royalty rate increases.* Section 119 is alone among the royalty-based compulsory licenses in not providing a mechanism for royalty rate increases on a periodic basis.

Copyright owners should have a reasonable opportunity to ensure that satellite companies are properly reporting and calculating the royalties due under the satellite compulsory license.

- *Under the current law, copyright owners have no means of verifying royalty payments short of initiating copyright infringement lawsuits.* Copyright owners have no ability under the compulsory license to resolve unexplained discrepancies between satellite companies' public statements concerning subscribership and their compulsory license royalty payments. The only current avenue available to copyright owners is to institute wasteful and expensive copyright infringement litigation over what may be honest or simple errors in reporting and calculating royalties.
- *Other compulsory licenses have provisions for verifying royalty payments.* Other compulsory licenses in the Copyright Act, including Sections 112 and 114, allow copyright owners to inspect the records of the compulsory licensees to ensure compliance with the compulsory license.
- *Licensing agreements that satellite companies enter into for other programming routinely contain audit provisions.* Inclusion of an audit provision in the satellite compulsory license would not add any new burden on satellite companies, and is a provision that they have been willing to accept in the marketplace.

Again, I thank you for this opportunity to present the views of television program copyright owners, and I look forward to responding to your questions.

Mr. SMITH. Mr. Moskowitz.

STATEMENT OF DAVID K. MOSKOWITZ, BOARD CHAIRMAN, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, ECHOSTAR COMMUNICATIONS CORPORATION, ON BEHALF OF SATELLITE BROADCASTING AND COMMUNICATIONS ASSOCIATION (SBCA)

Mr. MOSKOWITZ. Thank you, Chairman Smith, Ranking Member Berman, Congressman Boucher and Congressman Meehan.

My name is David Moskowitz, and I am chairman of the board of the Satellite Broadcasting and Communications Association. Our members include satellite TV, radio, and broadband platforms. We also include programmers, distributors, retailers, manufacturers, and others. We work to represent the interests of more than 22 million U.S. households that receive programming direct by satellite today.

When consumers are left behind by local network stations whose off-air signal does not reach a household, section 119 of the Copyright Act allows satellite to offer other network channels. We urge the Committee to allow these millions of underserved consumers, most of whom live in rural America, to continue receiving distant network channels and superstations through permanent extension of the Satellite Home Viewer Improvement Act.

Cable enjoys a permanent statutory license. A permanent satellite license, together with the following modifications to the SHVIA, would allow satellite to compete on a more level playing field against cable.

Consumers also rely on the congressionally provided grandfather clause of section 119 to continue receiving the channels they have watched for over 5 years. It has been suggested by some that Con-

gress should take away distant network channels from grandfathered consumers. We urge continued protection of the rights of these consumers.

Despite progress, satellite carriers are still saddled with regulations that are not imposed on cable. For example, cable pays lower per subscriber royalties than satellite for the exact same programming. Without taking a position with respect to the level for the specific rate and without fierce lobbying, we think it fair that Congress establish equivalent rates for satellite and cable; and, of course, the beans can be purchased at your local store and don't need to be launched into space at a cost of hundreds of millions of dollars.

Additionally, there are at least 50 communities that do not have local affiliates of all major networks. Cable routinely fills these holes by adding additional network channels from other markets. DBS is prohibited from doing so.

Further, cable is permitted to include significantly viewed channels in their offerings. DBS is not. For example, in Washington, D.C., as in dozens of other DMAs across the country, Comcast customers watch both Baltimore and Washington NBC network channels. DBS cannot offer the Baltimore NBC station in Washington. These disparities, we believe, should be rectified.

Turning to technology innovation, currently only about 600 of the 1,600 broadcasters across the U.S. have fully complied with their digital obligations. The DBS industry is uniquely positioned to be a catalyst to Congress' goal that digital television become available to all Americans.

We would ask that you to consider allowing consumers who cannot receive digital signals from their local station to receive them by satellite. Satellite can make distant network HD programming available to every household in America today, while continuing to provide all of the analog channels consumers have come to rely on. A clear license to offer digital network channels in digitally unserved areas would provide the encouragement these stations need to fulfill their promises to Congress.

Addressing corrections to the SHVIA, consumers do not understand why they should be prohibited from getting network channels by satellite when they can't get their local channels off air. They are angry when told they cannot purchase network channels by satellite if stations in neighboring markets are predicted by a computer to offer a channel off air. We would ask Congress to make clear that only stations in the consumer's home market can grant or deny a waiver.

Finally, consumers should only be permitted to request signal strength tests at their home if they are predicted to receive a weak signal. Consumers living near the local station's tower are uniformly frustrated when they request a test and find that they clearly do not meet the standard.

The answer for these millions of consumers to get the choice they deserve can only be found in revisions to the antiquated grade B standard to take into account changes in technology and consumer expectations over the past 50 years and to take into account ghosting and other factors which cause poor reception, even in areas re-

ceiving a strong off-air signal. Please direct the FCC to revise the standard to meet today's consumer expectations.

Mr. Chairman, the SBCA and the satellite industry appreciate the efforts of Congress to ensure that DBS is a more effective competitor to cable.

Thank you for allowing me to testify, and I would look forward to your questions.

Mr. SMITH. Thank you, Mr. Moskowitz.

[The prepared statement of Mr. Moskowitz follows:]

PREPARED STATEMENT OF DAVID K. MOSKOWITZ

Thank you Chairman Smith, Representative Berman, and members of the Subcommittee, my name is David Moskowitz, and I am Chairman of the Board of the Satellite Broadcasting and Communications Association (SBCA). SBCA is the national trade association that represents the satellite services industry. Our members include satellite television, radio and broadband providers, launch vehicle operators, programmers, equipment manufacturers, distributors and retailers.

Thank you to the members of this Subcommittee and to Congress for recognizing early on the potential of satellites to provide consumers with an alternative source for news, information and entertainment programming. The current Chairman of the Judiciary Committee, Mr. Sensenbrenner, was one of the original sponsors of the first Satellite Home Viewer Act (SHVA) in 1988. Much of the industry's success can be attributed to the actions of Congress in general, and this Committee in particular, in fostering satellite as an effective competitor in the multichannel video programming marketplace.

On behalf of the SBCA member companies, I urge the Committee to reauthorize the Satellite Home Viewer Improvement Act (SHVIA) and extend the satellite distant network signal and superstation compulsory license permanently. I would also like to recommend a handful of modifications to the SHVA that will ensure satellite television providers can continue to meet consumer expectations and compete effectively with other multichannel video programming distributors.

OVERVIEW

The satellite operators that SBCA represents provide the most advanced television choices in the multichannel video market, including high-definition television, personal video recorders and interactive services. The benefit of satellite-delivered technology like DBS is that it can reach consumers across the country without discriminating between rural and urban, sparsely or densely populated areas. Currently, nearly 22 million U.S. households receive television programming via satellite, from both direct broadcast satellite (DBS) and C-Band operators. To illustrate the tremendous growth of satellite television and DBS in particular, the last time this Subcommittee met to discuss the reauthorization of the SHVA, in 1999, there were 13 million satellite subscribers, over 10 million of whom subscribed to DBS. In five years, that number has more than doubled. Despite the emergence and continuing growth of DBS in the multichannel video marketplace, cable operators still serve 75% of multichannel video subscribers. Many factors have contributed to the growth of DBS in the multichannel video market, including the superior customer service, competitive pricing and the wide range of programming offered by DBS operators.

LOCAL-INTO-LOCAL

The growth that DBS has experienced, and the resulting benefit to consumers, is due in large part to the support the industry has received from Congress. Throughout the 16-year SHVA reauthorization process, Congress has recognized satellite's potential and the need to amend the Act to accommodate our technological innovations and new marketplace realities. The 1999 Satellite Home Viewer Improvement Act (SHVIA) was no exception. The provision allowing DBS providers for the first time to retransmit local broadcast stations was certainly a catalyst for the industry's recent growth.

Congress' decision to allow DBS providers to offer local-into-local service, and the subsequent roll out of that service by DBS providers, continues to be a principal reason that customers subscribe to DBS. This permanent statutory provision has given DBS providers the ability to compete with cable head-to-head, on a level playing field, in many markets.

Currently, consumers in 112 designated market areas (DMAs), reaching 87 percent of U.S. television households, are able to receive local broadcast stations via satellite from one or both of the DBS operators. In 2000, the first year that DBS providers were allowed to retransmit local broadcast stations into local markets, only 19 percent of DBS subscribers had local signals available to them via DBS. Satellite television providers have invested significant capital to improve the technology used to offer local-into-local service and to expand their satellite fleets, which has resulted in the ability to offer local broadcast stations to an increasing portion of the country, thereby creating a more competitive multichannel video programming distribution (MVPD) market.

REAUTHORIZATION OF SHVIA

Reauthorization of the Satellite Home Viewer Improvement Act provides Congress with an excellent opportunity to further improve the environment for providing advanced services and true competition in the MVPD market, in addition to continuing many of the established and proven provisions of the Act. In many critical respects, satellite carriers are saddled with regulatory provisions that are not imposed upon their competitors, and that makes satellite a less attractive option for many potential subscribers. One of the SBCA's principle objectives is to ensure that the satellite industry is able to compete more effectively with other MVPD providers.

Section 119 of the Copyright Act, which expires on December 31, 2004, allows satellite carriers to make network programming available to viewers unable to receive the over-the-air signals of their local network affiliates. Although this important provision does not affect many households in urban and suburban areas, the service is critical to consumers in rural areas. It is imperative that satellite providers be able to make network programming available to all of its subscribers when they are unable to receive their local broadcast channels over-the-air. Without distant network signals, many subscribers would be left with no alternative for network programming.

Additionally, section 119 permits satellite carriers to retransmit non-network broadcast stations to satellite subscribers. These so-called "superstations," such as WGN, have been a staple of cable system lineups since cable first began making its service available to consumers in the 1970's, and helped drive the growth of the satellite television industry. They continue to be among the most popular program offerings. The compulsory license ensures that satellite carriers have the same legal authority as cable to make this popular programming available to satellite subscribers.

Section 119 also allows certain eligible households to continue receiving distant network signals if they subscribed to these signals prior to October 31, 1999. The SBCA strongly supports extension of the distant network "grandfather" clause. This group of satisfied, long-term customers has come to rely upon this service for at least the last five years, and much longer in some cases. It makes no sense from a public policy standpoint to tell consumers that they can no longer receive this programming.

In order for both DBS and C-Band consumers to continue receiving this programming, the satellite compulsory license must be extended beyond its current expiration date of December 31, 2004. Our industry is still dependent upon the compulsory license to legally retransmit distant network signals and superstations. There is no private sector mechanism for the licensing of copyrighted programming carried on a distant network signal or superstation, and there have been no efforts that SBCA is aware of to establish such a rights clearing organization for either satellite or cable providers. The Subcommittee has aptly recognized in the past that clearing the rights to the hundreds of programs that make up a retransmitted broadcast signal would be administratively and economically burdensome. The compulsory license—while not perfect—makes clearing these rights possible. Moreover, as long as the satellite industry's chief competitor—cable—continues to enjoy a permanent, statutorily-granted compulsory license, both equity and the Congressional desire to promote competition in the MVPD marketplace dictate that satellite carriers be permitted to avail themselves of a compulsory license under the same terms as cable.

REGULATORY PARITY

One of the SBCA's principle objectives in the legislative process this year is to ensure that all MVPD providers can compete on a level playing field, which means establishing some degree of regulatory parity with cable when it comes to regulations governing carriage of broadcast channels. As I noted earlier, the SHVIA saddles the satellite industry with a number of affirmative obligations and prohibitions that make it difficult for DBS providers to offer programming comparable to that

offered by cable. For example, while the cable industry enjoys virtually unlimited ability to provide broadcast signals—both network and non-network, and distant or local—to its subscribers, satellite providers face strict restrictions on the broadcast signals they can provide to subscribers.

ROYALTY RATES

Another area of concern for satellite providers is the lack of parity between royalty rates paid under the satellite compulsory license and the cable compulsory license. In addition to enjoying a permanent license that never expires, the statutory licensing fees that cable pays are calculated differently. The result is that cable pays far lower per-subscriber royalty fees for distant network stations and superstations than do satellite providers for the exact same programming. Cable royalty rates are calculated using a formula based on the size in both subscribers and revenue of the cable system. Satellite royalty rates were last calculated by a Copyright Arbitration Royalty Panel (CARP) based on a set of factors designed to arrive at royalty rates that was as close to "fair market value" as possible. The rate that the CARP arrived at was so far in excess of the royalty rates paid by other MVPDs that Congress overturned the CARP decision and established its own statutory rates. And, as this Subcommittee knows, the whole CARP process has now been abandoned for an alternative approach. The disproportion between royalty rates paid by competing MVPDs remains a major issue for the satellite industry. In reauthorizing the SHVIA, Congress should take care to ensure that the rates are equivalent for both satellite and cable so that neither service provider enjoys an advantage over the other. In other words, the royalty rates for DBS should be adjusted downward so as to equal cable's rates.

CARRIAGE OF BROADCAST SIGNALS

The first issue of carriage of broadcast signals that I would like to address involves DBS providers' ability to offer a full complement of broadcast station programming. As DBS providers continue to offer more and more local-into-local services farther down the list of the 210 DMAs, there are at least 50 markets that do not have a full complement of local affiliates of the major networks. Current law does not allow DBS providers to make available to subscribers a broadcast station from a neighboring DMA to ensure that they get the whole complement of broadcast stations. This is because the local-into-local license contained in Section 122 of the Copyright Act only allows DBS operators to retransmit local stations back into the DMA to which they are assigned. Cable, on the other hand, can fill in holes in local station affiliate offerings with neighboring stations and routinely adds network affiliates and other broadcast stations so that its subscribers have the full line up of major network and other popular stations. The inability of DBS providers to offer subscribers a full complement of broadcast signals leaves them at a serious disadvantage vis-à-vis cable in competing for customers and is inconsistent with the FCC's policy objective of ensuring that consumers have access to all network programming.

Similarly, DBS operators are not permitted to tailor their local channel offerings to respond to local community needs or interests. Cable, on the other hand, is permitted to include broadcast channels that do not originate in their local markets if those signals are "significantly viewed" by the community. There is no such provision for DBS. As a result, DBS providers must adhere to DMA market designations that do not conform to a local community's viewing habits. For example, Comcast in New Haven, Connecticut, which is in the Hartford-New Haven DMA, offers CBS, NBC and FOX affiliates from both Hartford and New York City and ABC affiliates from both New Haven and New York City. DBS providers in New Haven cannot offer the New York City stations at all, and are thus at a serious competitive disadvantage.

TRANSITION TO DIGITAL TELEVISION

There is a new matter that I ask you to consider relating to the Section119 compulsory copyright license for distant network signals offered by DBS. As you are aware, the transition to digital television (DTV) is mired by many technical and legal complexities. At this point, more than 1,000 broadcasters have not met their obligations to broadcast their programming in DTV. Of these stations, 252 TV stations are not broadcasting HDTV service and 749 are broadcasting at low power.1 They continue to hoard this analog spectrum worth hundreds of billions of dollars that could be auctioned by the FCC to wireless companies eager to offer new advanced services. The DBS industry is uniquely positioned to make good on Congress'

goal that digital television become available to all Americans. By amending SHVIA, Congress can advance the digital transition.

Our proposal is simple. Allow households that cannot receive their local affiliates' digital signals to receive network DTV signals from their satellite TV provider. This can be done by broadening the existing compulsory license to permit DBS providers to offer network digital service in unserved areas. The expanded license would limit DBS service to only those households that cannot receive an over-the-air digital network signal. The availability of distant digital signals would have no real impact on the roll out of analog local-into-local service to additional markets by DBS operators. It would simply afford consumers nationwide new digital services currently unavailable.

WAIVER AND SIGNAL STRENGTH TESTING PROCESS

Although waivers represent a small portion of the issues DBS providers must deal with, we believe the current waiver and signal strength testing process for the receipt of distant network signals by those who are predicted to receive a Grade B over-the-air signal but who nonetheless do not receive a clear picture, as spelled out in SHVIA, needs to be revisited. The waiver process is not functioning as Congress envisioned when the law was enacted. After five years of experience working with the waiver process, we can testify that the current process often leads to a bad customer experience. In some cases the law is unclear; in other cases consumers have unrealistic expectations; still in other cases DBS providers and their customers are subject to the whims of broadcasters. We recommend only permitting consumers receiving a weak Grade B signal to request a signal strength test and prohibiting broadcasters from revoking waivers once given as long as the subscriber receives continuous service from their DBS provider. Further, the rules should be clarified to eliminate consumer confusion when a subscriber lives in an area that borders on another DMA by limiting the Grade B contour to a broadcaster's DMA for the purposes of securing waivers for a DBS subscriber to receive distant network signals. This will eliminate the need for customers to get multiple waivers from affiliates of the same network.

CONCLUSION

Mr. Chairman, in closing I'd like to reiterate that the SBCA and the satellite industry appreciate the efforts of Congress to ensure that DBS is a true competitor in the MVPD marketplace. With few exceptions, our experience under the SHVIA has been a positive one. While the DBS industry is growing, it is still necessary for Congress to reauthorize the extension of the satellite compulsory license and to ensure that the DBS industry is able to compete on a level playing field. To that end, this Committee should pay special attention to the royalty rates paid by satellite carriers and should endeavor to eliminate any competitive regulatory disadvantages faced by the DBS industry as it considers legislation to reauthorize the SHVIA.

1 FCC, "Summary of DTV Applications Filed and DTV Build Out Status, January 28, 2004.

Mr. SMITH. Mr. Lee.

STATEMENT OF ROBERT G. LEE, PRESIDENT AND GENERAL MANAGER, WDBJ TELEVISION, INC., ON BEHALF OF NATIONAL ASSOCIATION OF BROADCASTERS (NAB)

Mr. LEE. Thank you, Mr. Smith, Ranking Member Berman, Mr. Boucher, and Mr. Meehan.

I appreciate your having a small-market broadcaster appear today to talk about the real-world impact of SHVIA. As someone who has been in the television business for more than 30 years, I can tell you that our business is built on serving local viewers' needs with free, compelling, over-the-air local programming. As SHVIA affects how we reach local viewers, I am pleased to have an opportunity to comment on its reauthorization as well.

As you know and we've heard today, SHVIA contains two compulsory licenses. The first, the local into local license, has been a win/win for local broadcasters, for the satellite industry, and most importantly, I think, for the American television viewer. Tens of

millions of your constituents now have an additional option of receiving their local stations via satellite; and, as Mr. Moskowitz concedes, carriage of these local stations is one of the primary reasons viewers subscribe for satellite service. So our hope is that soon local television stations in all 210 local markets will be delivered by satellite. Clearly, the satellite industry is capable of doing so.

By year end, DirecTV expects to serve at least 130 markets, covering 92 percent of U.S. Television households. EchoStar already serves 107. Unfortunately, in our opinion, this service is marred by EchoStar's use of a discriminatory two-dish scheme, requiring subscribers in many markets to obtain a second dish to receive certain stations, especially religious and Spanish language stations.

The second compulsory license, the distant signal license, as we all know, has been plagued by satellite industry abuse. There is no other way to characterize it.

For 10 years, DBS ignored the standard that determines eligibility of a subscriber for distant signals by signing up almost anyone willing to say they were unhappy with their over-the-air picture. When this service was rightfully terminated, there was a firestorm of outrage and confusion, and you know who they pointed it at. Congress.

Even today, EchoStar continues providing illegal service to hundreds of thousands of subscribers. In fact, a Federal district judge recently found that EchoStar broke a sworn promise to a Federal court by failing to disconnect them.

With this sordid record, EchoStar and DirecTV today ask you to expand the digital signal license by creating this so-called digital white area. This proposal is a recipe for mischief.

If Members of the Committee are concerned about preserving free local over-the-air broadcasting in the digital age, you must reject it. A digital white area would undercut what would otherwise be a market-driven race between DirecTV, EchoStar and cable to deliver digital high-definition signals on a local-to-local basis. And when stations later sought to reclaim their own local viewers, there would be that same consumer uproar that would dwarf the outrage of 1999. In short, EchoStar and DirecTV are proposing a loophole big enough to drive a DISH network installation truck through.

The DBS industry suggests a digital white area will stimulate the DTV transition. Mr. Chairman, that is complete and total bunk as far as I am concerned.

The facts are television broadcasters have spent billions of dollars bringing digital television to consumers. To date, 1,155 stations are on the air in digital; and despite claims that stations are not transmitting at full power, 92 percent of households with access to an analog television signal also have access to a digital local signal. In those instances where stations have not powered up, there are tangible regulatory and technical obstacles beyond their control in many cases. Some stations have not received FCC authorization to go to full power. Some stations are experiencing tower location delays. Many stations have not received their final channel assignment. And, as stations increase power levels, interference issues have arisen.

At the end of the day, Congress may elect to simply reauthorize SHVIA in its current form for another 5 years. Should you, how-

ever, take a broader approach, we would urge a couple of improvements to SHVIA:

First, amend the definition of unserved household. If a household is in a market where the satellite companies offer local stations, there is no reason to bring in a distant signal; and, secondly, outlaw EchoStar's two-dish practice.

I strongly urge Congress to reauthorize a SHVIA that preserves and advances localism in television and does not harm it, and I thank you.

Mr. SMITH. Thank you, Mr. Lee.

[The prepared statement of Mr. Lee follows:]

PREPARED STATEMENT OF ROBERT G. LEE

INTRODUCTION AND SUMMARY

Ever since this Committee took the lead in crafting the Satellite Home Viewer Act of 1988 ("SHVA"), Congress has worked to ensure *both* (1) that free, over-the-air network broadcast television programming will be widely available to American television households, *and* (2) that satellite retransmission of television broadcast stations will not jeopardize the strong public interest in maintaining free, over-the-air local television broadcasting. Those two goals remain paramount today.

There can be no doubt that delivery of *local* stations by satellite is the best way to meet these twin objectives. The first two times this Committee considered the topic—in 1988 and 1994—delivery of local stations by satellite seemed far-fetched. Congress therefore resorted to a considerably less desirable solution: permitting importation of *distant* television stations, although only to households that could not receive their local network stations over the air.

When Congress revisited this area in 1999, the world had changed: local-to-local satellite transmission had gone from pipe dream to technological reality. And in response, in the 1999 Satellite Home Viewer Improvement Act ("SHVIA"), Congress took an historic step, creating a new "local-to-local" compulsory license to encourage satellite carriers to deliver *local* television stations by satellite to their viewers. At the same time, Congress knew that allowing satellite carriers to use the new license to "cherry-pick" only certain stations would be very harmful to free, over-the-air broadcasting and to competition within local television markets. Congress therefore made the new "local-to-local" license available only to satellite carriers that deliver all qualified local stations.

Congress' decision to create a carefully-designed local-to-local compulsory license has proven to be a smashing success. Despite gloomy predictions by satellite carriers before enactment of SHVIA that the "carry-one-carry-all" principle would sharply limit their ability to offer local-to-local service, the nation's two major DBS companies, DirecTV and EchoStar, today deliver local stations by satellite to the overwhelming majority of American television households.

Thanks to the wise decision by the FCC and the Department of Justice to block the proposed horizontal merger of DirecTV and EchoStar, the two DBS firms continue to compete vigorously against one another in expanding their delivery of local stations. While EchoStar predicted when it sought to acquire DirecTV that it would never be able to serve more than 70 markets without the merger, EchoStar now serves 107 Designated Local Markets ("DMA's") that collectively cover more than 83% of all U.S. TV households. Nor is there any sign that EchoStar's expansion of local-to-local service has stopped.

The story with DirecTV is even more dramatic. With the launch of a new satellite this spring, DirecTV expects to serve 100 DMAs covering 85% of all U.S. TV households. By the end of 2004, DirecTV has committed to providing local-to-local in an additional 30 markets, for a total of at least 130 DMAs covering 92% of all TV households. And as early as 2006 and no later than 2008, "DirecTV will offer a seamless, integrated local channel package in *all 210 DMAs." In Re General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee, for Authority to Transfer Control*, ¶332, MB Docket No. 03–124 (released Jan. 14, 2004) (emphasis added).

The local-to-local compulsory license is the right way—and the distant-signal compulsory license is the wrong way—to address delivery of over-the-air television stations to satellite subscribers. If Congress wishes to do anything other than briefly extend the expiration date of Section 119, it should—as a matter of simple logic—limit the distant-signal compulsory license to markets in which the satellite carrier

does not offer local-to-local service. It makes no sense, for example, to treat a satellite subscriber as "unserved" by its local CBS station when the subscriber's DBS firm offers that station as part of its satellite-delivered package, with what the satellite industry describes as "a 100 percent, crystal-clear digital audio and video signal."

Although the rapid rollout of DBS local-to-local service has vindicated the actions that Congress took in SHVIA in 1999, there is one major blemish on the success story: an outrageous form of discrimination that EchoStar has inflicted on some local stations. EchoStar's method of discrimination is simple, but devastating. While placing what it considers the most "popular" stations in a market on its main satellites, EchoStar relegates certain stations (particularly Hispanic and foreign-language stations) to a form of satellite Siberia—placing them on remote "wing satellites" far over the Atlantic or Pacific, which can be seen only if one obtains a second satellite dish. Very few subscribers actually do acquire a second dish, thereby rendering many local stations invisible to their own local viewers. As even DirecTV has acknowledged, this practice violates the "carry one, carry all" principle of the SHVIA. The FCC has thus far tolerated this grossly improper practice, imposing only minor restrictions on this form of discrimination. If the Commission fails to take prompt and decisive steps to halt this misconduct, Congress will need to step in to do so.

While the local-to-local compulsory license has (with the exception of EchoStar's two-dish abuse) generally worked well, the history of the distant-signal compulsory license (codified in Section 119 of the Copyright Act) has been just the opposite. For the first ten years after this law was enacted, satellite carriers systematically ignored the clear, objective definition of "unserved household" and instead delivered distant signals to anyone willing to say that they did not like their over-the-air picture quality. Only through costly litigation—culminating in a 1998 ruling against PrimeTime 24 and a 1999 ruling against DirecTV—were broadcasters able to bring a halt to most of this lawlessness. Even after those rulings, however, EchoStar has continued to serve hundreds of thousands of illegal subscribers, forcing broadcasters to spend years chasing it through the courts to obtain relief. Last June, a United States District Court found (after a ten-day trial) that EchoStar willfully or repeatedly violated the distant-signal provisions of the Copyright Act—and, in the process, broke a sworn promise to the court to turn off large numbers of illegal subscribers.

Startlingly, having been content to violate the distant-signal license until ordered by a court to stop breaking the law, the DBS firms now urge Congress to radically *expand* the distant-signal compulsory license. In particular, EchoStar and DirecTV now ask that they be allowed to import ABC, CBS, Fox, and NBC programming from New York and Los Angeles stations to millions of households that can receive the same programming from their local stations over the air—and in most cases, can also get their local stations in superb quality, by satellite, from EchoStar and DirecTV as part of their local-to-local package. Although these homes are unquestionably "served" by their local stations, the DBS industry proposes to be allowed to deliver the same programming from New York or Los Angeles if the household is—in their view—"digitally unserved."

The DBS industry proposal—by an industry with a long track record of lawlessness—is a recipe for mischief. As this Committee has repeatedly recognized, the distant-signal compulsory license is a departure from marketplace principles that is appropriate only as a "lifeline" for households that otherwise cannot view network programming. It would make no sense to override normal copyright principles for households that can readily view their own local stations. It would give the DBS firms a government-provided crutch that would set back for years what would otherwise be a market-driven race between DirecTV and EchoStar—further spurred by competition with cable—to deliver digital signals on a local-to-local basis. And when local stations later sought to reclaim their own local viewers from the distant digital transmissions, there would be a consumer firestorm much like what occurred when two major satellite carriers were required to turn off (illegally-delivered) distant analog signals to millions of households in 1999.

Finally, given the rapid pace of technological and economic change, Congress should again specify that Section 119 will sunset after a limited, five-year period, so that Congress can decide then if there is any reason to continue this government intervention in the free market for copyrighted television programming.

I. THE PRINCIPLES OF LOCALISM AND OF RESPECT FOR LOCAL STATION EXCLUSIVITY ARE FUNDAMENTAL TO AMERICA'S EXTRAORDINARILY SUCCESSFUL TELEVISION DELIVERY SYSTEM

As this Committee has consistently recognized—going back to 1988, when it took the lead in crafting the first satellite compulsory license in the SHVA—the prin-

ciples of localism and of local station exclusivity have been pivotal to the success of American television.

A. The Principle of Localism is Critical To America's Extraordinary Television Broadcast System

Unlike many other countries that offer only national television channels, the United States has succeeded in creating a rich and varied mix of *local* television outlets through which more than 200 communities—including towns as small as Glendive, Montana, which has fewer than 4,000 television households—can have their own local voices. But over-the-air local TV stations—particularly those in smaller markets such as Glendive—can survive only if they can generate advertising revenue based on local viewership. If satellite carriers can override the copyright interests of local stations by offering the same programs on stations imported from other markets, the viability of local TV stations—and their ability to serve their communities with the highest-quality programming—is put at risk.

The "unserved household" limitation is simply the latest way in which the Congress and the FCC have implemented the fundamental policy of localism, which has been embedded in federal law since the Radio Act of 1927.[1] In particular, the "unserved household" limitation in the SHVA implements a longstanding communications policy of ensuring that local network affiliates—which provide free television and local news to virtually all Americans—do not face importation of duplicative network programming.

The objective of localism in the broadcast industry is "to afford each community of appreciable size an over-the-air source of information and an outlet for exchange on matters of local concern." *Turner Broadcasting Sys.* v. *FCC*, 512 U.S. 622, 663 (1994) *(Turner I)*; *see United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 174 & n.39 (1968) (same). That policy has provided crucial public interest benefits. Just a few years ago, the Supreme Court declared that

> Broadcast television is an important source of information to many Americans. Though it is but one of many means for communication, by tradition and use for decades now it has been an essential part of the national discourse on subjects across the whole broad spectrum of speech, thought, and expression.
>
> *Turner Broadcasting Sys.* v. *FCC,* 117 S. Ct. 1174, 1188 (1997).

Thanks to the vigilance of Congress and the Commission over the past 50 years in protecting the rights of local stations, over-the-air television stations today serve more than 200 local markets across the United States, including markets as small as Presque Isle, Maine (with only 28,000 television households), North Platte, Nebraska (with fewer than 15,000 television households), and Glendive, Montana (with only 3,900 television households).

This success is largely the result of the partnership between broadcast networks and affiliated television stations in markets across the country. The programming offered by network affiliated stations is, of course, available over-the-air for free to local viewers, unlike cable or satellite services, which require substantial payments by the viewer. *See Turner I,* 512 U.S. 622, 663; *Satellite Broadcasting & Communications Ass'n* v. *FCC*, 275 F.3d 337, 350 (4th Cir. 2001) ("SHVIA . . . was designed to preserve a rich mix of broadcast outlets for consumers who do not (or cannot) pay for subscription television services."); Communications Act of 1934, § 307(b), 48 Stat. 1083, 47 U.S.C. § 307(b). Although cable, satellite, and other technologies offer alternative ways to obtain television programming, tens of millions of Americans still rely on broadcast stations as their exclusive source of television programming, *Turner I*, 512 U.S. at 663, and broadcast stations continue to offer most of the top-rated programming on television.

The network/affiliate system provides a service that is very different from non-broadcast networks. Each network affiliated station offers a unique mix of national programming provided by its network, local programming produced by the station itself, and syndicated programs acquired by the station from third parties. H.R. Rep. 100–887, pt. 2, at 19–20 (1988) (describing network/affiliate system, and concluding

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[1] First Report and Order, 14 FCC Rcd 2654, ¶ 11 (1999); *see* SHVA Notice of Proposed Rule Making, ¶ 3 ("The network station compulsory licenses created by the Satellite Home Viewer Act are limited because Congress recognized the importance that the network-affiliate relationship plays in delivering free, over-the-air broadcasts to American families, and because of the value of localism in broadcasting. Localism, a principle underlying the broadcast service since the Radio Act of 1927, serves the public interest by making available to local citizens information of interest to the local community (*e.g.*, local news, information on local weather, and information on community events). Congress was concerned that without copyright protection, the economic viability of local stations, specifically those affiliated with national broadcast network[s], might be jeopardized, thus undermining one important source of local information.")

that "historically and currently the network-affiliate partnership serves the broad public interest.") Unlike nonbroadcast networks such as Nickelodeon or USA Network, which telecast the same material to all viewers nationally, each network affiliate provides a customized blend of programming suited to its community—in the Supreme Court's words, a "local voice."

The local voices of America's local television broadcast stations make an enormous contribution to their communities. In Appendix A, we list just a few examples of television broadcasters' commitment to localism in the form of help to local citizens—and local charities—in need. It is through local broadcasters that local citizens and charities raise awareness and educate members of the community.

Community service programming—along with day-to-day local news, weather, and public affairs programs—is made possible, in substantial part, by the sale of local advertising time during and adjacent to network programs. These programs (such as "Alias," "CSI," "American Idol," and "Friends") often command large audiences, and the sale of local advertising slots during and adjacent to these programs is therefore a crucial revenue source for local stations.

A variety of technologies have been developed or planned—including cable, satellite, open video systems, and the Internet—that, as a technological matter, enable third parties to retransmit distant network stations into the homes of local viewers. Whenever those technologies posed a risk to the network/affiliate system, Congress or the Commission (or both) have acted to ensure that the retransmission system does not import duplicative network programming from distant markets. A recent example is the threat of unauthorized Internet retransmissions of television stations, which was quickly halted by the courts (applying the Copyright Act) and condemned by Congress as outside the scope of any existing compulsory license.[2]

In the case of cable television, for example, the FCC has since the mid-1960's imposed "network nonduplication" rules on cable systems. 47 C.F.R. §§ 76.92–76.97 (1996). As the Commission explained when it strengthened the network nonduplication rules in 1988:

> [I]mportation of duplicating network signals can have severe adverse effects on a station's audience. In 1982, network non-duplication protection was temporarily withdrawn from station KMIR-TV, Palm Springs. The local cable system imported another network signal from a larger market, with the result that KMIR-TV lost about one-half of its sign-on to sign-off audience. Loss of audience by affiliates undermines the value of network programming both to the affiliate and to the network. Thus, an effective non-duplication rule continues to be necessary.[3]

2. Protecting the Rights of Copyright Owners to License Their Works in the Marketplace is Another Principle Supporting a Highly Circumscribed Distant-Signal Compulsory License

By definition, the Copyright Act is designed to *limit* unauthorized marketing of works as to which the owners enjoy exclusive rights. *See* U.S. Constitution, art. I, § 8, cl. 8 ("The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"); *Mazer* v. *Stein*, 347 U.S. 201, 219 (1954) ("The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.' ").

While Congress has determined that compulsory licenses are needed in certain circumstances, the courts have emphasized that such licenses must be construed narrowly, "lest the exception destroy, rather than prove, the rule." *Fame Publ'g Co.* v. *Alabama Custom Tape, Inc.,* 507 F.2d 667, 670 (5th Cir. 1975); *see also* Cable Compulsory License; Definition of Cable Systems, 56 Fed. Reg. 31,580, 31,590 (1991) (same). The principle of narrow application and construction of compulsory licenses is particularly important as applied to the distant-signal compulsory license, because that license not only interferes with free market copyright transactions but also threatens localism.

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[2] *See National Football League* v. *TVRadioNow Corp. (d/b/a iCraveTV),* 53 U.S.P.Q.2d (BNA) 1831 (W.D. Pa. 2000); 145 Cong. Rec. S14990 (Nov. 19, 1999) (statements by Senators Leahy and Hatch that no compulsory license permits Internet retransmission of TV broadcast programming).

[3] Report and Order, *In Re Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries*, 3 FCC Rcd 5299, 5319 (1988), *aff'd*, 890 F.2d 1173 (D.C. Cir. 1989); *see also Southwestern Cable Co.*, 392 U.S. at 165; *Wheeling Antenna Co.* v. *WTRF-TV, Inc.*, 391 F.2d 179, 183 (4th Cir. 1968).

3. In Enacting the SHVA and the SHVIA, Congress Reaffirmed the Central Role of Localism and of Local Program Exclusivity

When Congress (led by this Committee) crafted the original Satellite Home Viewer Act in 1988, it emphasized that the legislation "respects the network/affiliate relationship and promotes localism." H.R. Rep. No. 100–887, pt. 1, at 20 (1988). And when Congress temporarily extended the distant-signal compulsory license in 1999, it reaffirmed the importance of localism as fundamental to the American television system. For example, the 1999 SHVIA Conference Report says this:

> "*[T]he Conference Committee reasserts the importance of protecting and fostering the system of television networks as they relate to the concept of localism.* . . . [T]elevision broadcast stations provide valuable programming tailored to local needs, such as news, weather, special announcements and information related to local activities. To that end, the Committee has structured the copyright licensing regime for satellite to encourage and promote retransmissions by satellite of *local* television broadcast stations to subscribers who reside in the *local* markets of those stations."
>
> SHVIA Conference Report, 145 Cong. Rec. H11792 (daily ed. Nov. 9, 1999) (emphasis added).

The SHVIA Conferees also stressed the need to interfere only minimally with marketplace arrangements—premised on protection of copyrights—in the distribution of television programming:

> "[T]he Conference Committee is aware that *in creating compulsory licenses* . . . [it] *needs to act as narrowly as possible to minimize the effects of the government's intrusion* on the broader market in which the affected property rights and industries operate. . . . *[A]llowing the importation of distant or out-of-market network stations in derogation of the local stations' exclusive right—bought and paid for in market-negotiated arrangements—to show the works in question undermines those market arrangements.*"

Id. The Conference Report also emphasized that "the specific goal of the 119 license, which is to allow for *a life-line network television service to those homes beyond the reach of their local television stations*, must be met by *only* allowing distant network service to those homes which cannot receive the local network television stations. Hence, the 'unserved household' limitation that has been in the license since its inception." *Id.* (emphasis added).

Finally, the SHVIA Conferees highlighted "the continued need to monitor the effects of distant signal importation by satellite," and made clear that Congress would need to re-evaluate after five years whether there is any "continuing need" for the distant signal license. *Id.* That time, of course, is now.

II. PROPERLY IMPLEMENTED, THE LOCAL-TO-LOCAL COMPULSORY LICENSE IS A WIN-WIN-WIN FOR CONSUMERS, BROADCASTERS, AND SATELLITE COMPANIES

Unlike the importation of distant network stations, which can do grave damage to the network/affiliate relationship, delivery of *local* stations to the stations' own *local* viewers—*e.g.*, San Antonio stations to viewers in the San Antonio area—is a win-win-win for consumers, local broadcasters, and DBS firms alike. As Congress explained in 1999 when it created a new local-to-local compulsory license in Section 122 of the Copyright Act, the new Act "structures the copyright licensing regime for satellite to encourage and promote retransmissions by satellite of *local* television broadcast stations to subscribers who reside in the *local* markets of those stations." 145 Cong. Rec. H11792 (daily ed. Nov. 9, 1999) (emphasis added).

A. Satellite Firms Have Enjoyed Extraordinary Growth, Thanks In Major Part To the Local-to-Local Compulsory License

As the FCC recognized in its January 2004 Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, the Direct Broadcast Satellite ("DBS") industry is thriving—and offering potent competition to cable. The DBS industry, which signed up its first customer only decade ago, grew to more than 20 million subscribers as of June 2003. Annual Assessment, MB Dkt. No. 03–172, ¶8 (released Jan. 28, 2004). The growth rate for DBS "exceeded the growth of cable by double digits" in every year between 1994 and 2002, and in 2003 exceeded the cable growth rate by 9.2%. *Id.* Just in the 12 months between June 2002 and June 2003, the DBS industry added 2.2 million net new subscribers, surging from 18.2 million to 20.4 million households. *Id.*

DirecTV is currently the second-largest multichannel video programming distributor ("MVPD"), behind only Comcast, while EchoStar is the fourth-largest

MVPD. *Id.*, ¶67. The DBS firms take many subscribers away from cable: "according to [DirecTV] internal data, approximately 70% of its customers were cable subscribers at the time that they first subscribed to DirecTV." *Id.*, ¶65.

The growth of the DBS industry has far outstripped even optimistic predictions made just a few years ago. In its January 2000 Annual Assessment, for example, the FCC quoted bullish industry analysts who predicted that "DBS will have nearly 21 million subscribers by 2007." 2000 Annual Assessment, 15 FCC Rcd. 978, ¶70. As the statistics quoted above show, DBS reached that level not in 2007, but in *2003*—four years earlier than predicted.

As the FCC has repeatedly pointed out, delivery of local stations by satellite has been a major spur to this explosive growth. *E.g.*, 2004 Annual Assessment, ¶8. In June 1999, just before the enactment of the new local-to-local compulsory license in the SHVIA, the DBS industry had 10.1 million subscribers. 2000 Annual Assessment, ¶8. Only four years later, the industry had more than doubled that figure to 20.4 million subscribers. 2004 Annual Assessment, ¶8. That this growth has been spurred by the availability of local-to-local is beyond doubt: the DBS industry's own trade association, the Satellite Broadcasting & Communications Association, stressed just a few months ago that "[t]he expansion of local-into-local service by DBS providers *continues to be a principal reason that customers subscribe to DBS*." SBCA Comments at 4, Dkt. No. 03–172 (filed Sept. 11, 2003) (emphasis added).

B. Contrary to the DBS Industry's Pessimistic Predictions, Satellite Local-to-Local Service is Now Available to the Overwhelming Majority of American Television Households

Over the past few years, EchoStar and DirecTV have repeatedly claimed that capacity constraints will severely limit their ability to offer local-to-local service to more than a small number of markets. The DBS firms used that argument—unsuccessfully—in 1999 in attempting to persuade Congress that it should permit DBS companies to use a new compulsory license to "cherry-pick" only the most heavily-watched stations in each market. They used it again in arguing—again unsuccessfully—in 2000 and 2001 that the courts should strike down SHVIA's "carry one, carry all" principle as somehow unconstitutional. And they trotted out the same claims as a justification for the proposed horizontal merger of the nation's only two major DBS firms, DirecTV and EchoStar. As recently as 2002, for example, the two DBS firms claimed that unless they were permitted to merge, neither firm could offer local-to-local in more than about 50 to 70 markets. *EchoStar, DirecTV CEOs Testify On Benefits of Pending Merger Before U.S. Senate Antitrust Subcommittee,* www.spacedaily.com/news/satellite-biz-02p.html ("Without the merger, the most markets that each company would serve with local channels as a standalone provider, both for technical and economic reasons, would be about 50 to 70.") (quoting DirecTV executive).

Contrary to these pessimistic predictions, the two DBS firms *already* offer local-to-local programming to the overwhelming majority of U.S. television households. Although the DBS firms claimed they would never be able to serve more than 70 markets unless they merged, EchoStar *already* serves 107 Designated Local Markets ("DMA's"), which collectively cover more than 83% of all U.S. TV households.[4] Nor is there any sign that EchoStar's expansion of local-to-local service has stopped.

DirecTV's plans are still more ambitious. As of November 2003, DirecTV offered local-to-local to 64 markets covering more than 72% of all U.S. television households. With the launch of a new satellite in the next few months, DirecTV expects to serve 100 DMAs covering 85% of all U.S. TV households. By the end of 2004, DirecTV has committed to providing local-to-local in an additional 30 markets, for a total of at least 130 DMAs that collectively include 92% of all U.S. TV households.[5] And as early as 2006 and no later than 2008, "DirecTV will offer a seamless, integrated local channel package in *all 210 DMAs*.'[6]/ In other words, DirecTV alone will soon offer local-to-local service to virtually all American television households—

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[4] EchoStar Press Release, www.dishnetwork.com, *DISH Network Satellite Television Brings Local TV Channels to Tri-Cities, Tenn.—Va.* (Feb. 19, 2004) (EchoStar now serving 107 DMAs); EchoStar Press Release, www.newstream.com/us/story—pub.shtml?story—id=11738 &user—ip=208.197.234.126, *DISH Network Celebrates Availability of Local Channels in 100 Markets* (Dec. 2003) (EchoStar serving more than 83% of U.S. television households through service to 100 markets).

[5] Press Release, *DIRECTV Names 18 New Local Channel Markets to Launch in 2004* (Jan. 8, 2004), www.directv.com/DTVAPP/aboutus/headline.dsp?id=01—08—2004B.

[6] *In the Matter of General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee, for Authority to Transfer Control,* ¶332, MB Docket No. 03–124 (released Jan. 14, 2004) (emphasis added).

even though DirecTV told Congress and the FCC just two years ago that this result was unthinkable unless it merged with EchoStar.

C. Echostar And DirecTV Boast About The Excellent Technical Quality Of Their Current Local-To-Local Service—Which Retransmits "Digitized" Analog Signals

As discussed below, the satellite industry now demands that Congress expand the *distant-signal* compulsory license—which EchoStar has systematically abused over the past eight years—by creating a new category of households that are "digitally unserved." But any suggestion that EchoStar and DirecTV have difficulty attracting customers under the *current* law is belied by the following facts.

First, both DirecTV and EchoStar can now—or will within a few months—each be able to deliver local television stations by satellite to nearly 90% of U.S. television households. *Second,* both DBS firms obtain excellent-quality analog signals from the stations, often working with the stations themselves to obtain a direct feed from the station's studios. *Third,* after receiving a high-quality analog signal, the DBS firms then "digitize" the signals and retransmit them in digital format to their customers. *See* www.dishnetwork.com/content/programming/ index.shtml ("DISH Network now has *your digital local channels*.") <visited Feb. 16, 2004> (emphasis added). While these signals do not equal the quality of a signal originating from a digital broadcast, or particularly of a high-definition broadcast, the result, according to the DBS industry's trade association, is that DBS *"always delivers a 100 percent, crystal-clear digital audio and video signal,"* even if the original source is an analog broadcast. SBCA Web site, www.sbca.com/mediaguide/faq.htm <visited Feb. 19, 2004> (emphasis added).

In other words, consumers who receive an excellent-quality "digitized" analog signal from a local station from a DBS firm—as opposed to an imported digital station—are scarcely in a "hardship" position. Of course, it has *never* been the case that "obtaining the best-quality signal" would justify abandoning the principles of localism and free market competition. The principle behind the long-standing "Grade B intensity" standard for determining which households are "unserved" is that Grade B intensity is an objective proxy for an *acceptable* signal, not for the *optimal* signal. If localism could be so easily sacrificed, Congress would not have adopted—and twice reaffirmed—the Grade B intensity standard.[7]

Finally, these local channel offerings have made DBS so attractive to consumers that it is gaining millions of new subscribers every year while the number of cable subscribers is actually *shrinking*. 2004 Annual Assessment, ¶ 8 ("In the last several years . . . cable subscribership has declined such that as of June 2003, there were approximately the same number of cable subscribers as there were at year-end 1999.") While delivery of *local* digital signals by DirecTV and EchoStar would be a highly desirable development, there is no basis for suggesting that DirecTV and EchoStar need to import *distant* digital signals to serve their customers.

D. DirecTV and EchoStar Have Many Options For Continuing To Expand Their Ability To Deliver Local Signals, Including Local Digital Signals

As discussed above, DirecTV and EchoStar have brilliant engineers who constantly find ways to deliver more programming in the same spectrum. Nevertheless, in policy debates in Washington, the two firms regularly assure Congress (and the FCC) that no further technological improvement can be achieved. To mention one other example: even as DirecTV was doubling its "compression ratio" between 1998 and 2001—enabling it to carry twice as many channels in the same amount of spectrum—it repeatedly told the FCC that it had hit a brick wall as far as any further progress in compression technology:

- July 31, 1998: "DIRECTV has *substantially reached current limits* on digital compression with respect to the capacity on its existing satellites. Therefore, the addition of more channels will necessitate expanding to additional satellites. . . ."
- Aug. 6, 1999: "DIRECTV has *substantially reached current limits* on digital compression with respect to the capacity on its existing satellites."
- Sept. 8, 2000: "DIRECTV has *substantially reached current technological limits* on digital compression with respect to capacity on its existing satellites.

[7] In the SHVIA, Congress directed the FCC to prepare a report about whether Grade B intensity—or instead some other standard—should be used for determining whether households are "unserved" by their local stations. In its report, the FCC recommended retaining the Grade B intensity standard. *See In Re Technical Standards for Determining Eligibility For Satellite-Delivered Network Signals Pursuant To the Satellite Home Viewer Improvement Act,* ET Docket No. 00–90 (released Nov. 29, 2000).

Although there are potentially very small gains still possible through the use of advanced algorithms, such technological developments can neither be predicted nor relied upon as a means of increasing system channel capacity."

- Aug. 3, 2001: "DIRECTV has offered digitally compressed signals from its inception, and *has substantially reached current technological limits* on digital compression with respect to capacity on its existing satellites. Although there are potentially very small gains still possible through the use of advanced algorithms, such technological developments can neither be predicted nor relied upon as a means of increasing system channel capacity."[8]

This year, the Committee can expect to hear from the DBS firms yet again that they have no hope of significantly expanding their capacity. For example, we can expect to hear from DirecTV and EchoStar that they will never be able to carry the digital signals of local television stations, and that they should instead be given a crutch by Congress to help them compete with cable. In fact, the satellite firms have available to them a wide range of potential new techniques for massively expanding their capacity, including:

- pectrum-sharing between DirecTV and EchoStar;
- use of Ka-band as well as Ku-band spectrum;
- higher-order modulation and coding;
- closer spacing of Ku-band satellites;
- satellite dishes pointed at multiple orbital slots;
- use of a second dish to obtain all local stations;[9] and
- improved signal compression techniques.

If Congress allows the power of American technical ingenuity to continue to move forward, we can expect to see DirecTV and EchoStar continue to make tremendous progress in doing more with the same resources. Just as today's desktop computers are unimaginably more powerful than those available just a few years ago, we can expect similar quantum improvements from America's satellite engineers—if Congress leaves the free market to do its magic, and leaves necessity to continue to be the mother of invention.

E. If The FCC Does Not Act, Congress Will Need To Step In To Correct A Major Abuse Of Local-To-Local By Echostar

In crafting the SHVIA, Congress was well aware that if a DBS firm were permitting to select only some—but not all—local stations for retransmission, the stations left off the service would have little chance of reaching viewers who obtain their TV service from the satellite company. In the same spirit as the requirement in the 1992 Cable Act that cable systems carry all qualified local stations in each market in which they operate, the SHVIA specifies that if a satellite carrier chooses to use the local-to-local license to carry signals in a particular market, it must carry *all* qualified local stations. 47 U.S.C. § 338(a)(1). That requirement has been upheld against constitutional attack by EchoStar, DirecTV, and their trade association. *Satellite Broadcasting and Communications Ass'n* v. *FCC,* 275 F.3d 337 (4th Cir. 2001). The purpose of the "carry one, carry all" principle is, of course, to ensure the continued availability of a wide variety of different over-the-air channels, and to prevent the local-to-local compulsory license from interfering with existing vigorous competition among all of the broadcast stations in each local market.

Since late 2001, EchoStar has egregiously violated the requirement that it carry all stations in a nondiscriminatory manner: in many markets, EchoStar forces consumers to acquire a second satellite dish to receive some—but not all—local stations. Here in the Washington, D.C. area, for example, EchoStar enables its customers to see the ABC, CBS, Fox, and NBC stations (and a handful of other local stations) with a single satellite dish, pointed at EchoStar's main satellites. *See*

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[8] *See, e.g.,* Comments of DIRECTV, Inc., [1998] Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 98–102, at 5 (filed July 31, 1998); Comments of DIRECTV, Inc., [1999] Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 99–230, at 9 (filed Aug. 6, 1999); Comments of DIRECTV, Inc. [2000] Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 00–132, at 16 (filed Sept. 8, 2000); Comments of DIRECTV, Inc. [2001] Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 01–129, at 16 (filed Aug. 3, 2001) (emphasis added in all cases).

[9] The SHVIA permits a satellite carrier to offer *all* local stations via a second dish, but not to split local channels into a "favored" group (available with one dish) and a "disfavored" group (available only with a second dish).

EchoStar web site, www.dishnetwork.com/content/programming/ locals/index.shtml. On the other hand, viewers wishing to see Channel 14 (Univision), Channel 32 (WHUT—PBS), Channel 53 (WNVT—International), Channel 56 (WNVC—International), or WJAL (Channel 68—Independent) are forced to obtain a second satellite dish aimed at a satellite far over the Atlantic. *Id.* (In this and other markets, EchoStar targets public television, Hispanic, and other foreign-language stations for this discrimination.) Because few viewers will go to the time and trouble of obtaining a second dish—*e.g.*, a long wait at home for an installer—the net result is that only a tiny percentage of EchoStar subscribers can actually view all of their local stations. To date, the FCC has taken only ineffective steps to address this egregious form of discrimination,[10] even though EchoStar's fellow DBS company, DirecTV, has told the FCC that EchoStar's two-dish ploy "is inconsistent with the language of the Satellite Home Viewer Improvement Act." *See* Letter from Merrill S. Spiegel to Marlene H. Dortch, Dkt. No. 00–196 (Jan. 16, 2003).

The Commission has recently indicated that it plans to take action soon to address EchoStar's two-dish practices,[11] but it remains uncertain when it will act on pending petitions for review. Should the Commission fail to take prompt action, Congress should step in to ensure that EchoStar can no longer thumb its nose at Congress' unmistakable directive that DBS firms that local-to-local means carriage of *all* local stations, without relegating many of the stations to an inaccessible electronic ghetto.

III. THE DISTANT-SIGNAL COMPULSORY LICENSE HAS BEEN EGREGIOUSLY ABUSED BY SATELLITE CARRIERS, AND THE NEED FOR IT IS RAPIDLY DIMINISHING WITH THE GROWTH OF LOCAL-TO-LOCAL

America's free, over-the-air television system is based on *local* stations providing programming to *local* viewers. When satellite carriers began delivering television programming in the 1980's, however, retransmission of local television stations by satellite was not yet technologically feasible. In 1988, Congress therefore fashioned a stopgap remedy: a compulsory license that allows satellite carriers to retransmit *distant* network stations, but only to "unserved households." 17 U.S.C. § 119. The heart of the definition of "unserved household" is whether the residence can receive an over-the-air signal of a certain objective strength, called "Grade B intensity," from an affiliate of the relevant network. *Id.*, § 119(d)(10) (definition of "unserved household"). In 1994, Congress extended the distant-signal license for another five years, although it expressly placed on satellite carriers the burden of proving that each of their customers is "unserved." 17 U.S.C. § 119(a)(5)(D).

In 1999, Congress again extended the distant-signal license as part of the SHVIA, and statutorily mandated use of the FCC-endorsed computer model (called the "Individual Location Longley-Rice" model, or "ILLR") for predicting which households are able to receive signals of Grade B intensity from local network stations. 17 U.S.C. § 119(a)(2)(B)(ii). In the SHVIA, Congress also classified certain very limited new categories of viewers as "unserved," including (1) certain subscribers who had been illegally served by satellite carriers but whom Congress elected to "grandfather" temporarily, *see* 17 U.S.C. § 119(e), and (2) qualified owners of recreational vehicles and commercial trucks, *see id.*, § 119(a)(11).

By its terms, grandfathering will expire at the end of 2004. 17 U.S.C. § 119(e). Unlike in 1999, when Congress saw grandfathering as a way to reduce consumer complaints by allowing certain ineligible subscribers to continue receiving distant

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[10] Declaratory Ruling & Order, *In re National Association of Broadcasters and Association of Local Television Stations Request for Modification or Clarification of Broadcast Carriage Rules for Satellite Carriers*, Dkt. No. CSR–5865–Z (Media Bureau Apr. 4, 2002). The Commission has to date required only that EchoStar fully disclose its discriminatory treatment and that it pay for the installation of the second dish. Not surprisingly, these requirements have not solved the fundamental problem that acquiring a second dish requires a major expenditure of time and effort on the part of the subscriber, with the result that—just as EchoStar hopes—few viewers ever actually acquire a second dish.

Moreover, EchoStar has, on many occasions, violated even the minimal requirements of the Ruling & Order by failing adequately to notify subscribers about the need for a second dish, actively discouraging subscribers from obtaining a second dish, falsely telling them they would have to pay for the second dish, or falsely stating that they could not have a second dish installed at the time of their original installation. *In re University Broadcasting, Inc.* v. *EchoStar Communications Corp.,* Mem. Op. & Order, Dkt. No CSR–6007–M (Feb. 20, 2003); In Re Entravision Holdings, LLC, Mem. Order & Op., Dkt. No. CSC–389 (April 15, 2002); *In Re Tri-State Christian, Inc.*, Mem. Op. & Order, Dkt. No. CSR–5751 (Feb. 5, 2004).

[11] *See* Separate Statement of Chairman Michael K. Powell, at 2 n.3, *In Re General Motors Corporation and Hughes Electronics Corporation, Transferors and The News Corporation Limited, Transferee, for Authority to Transfer Control*, MB Docket No. 03–124 (released Jan. 14, 2004).

signals, the end of grandfathering will have little impact in the marketplace. This special exception should therefore be allowed to expire routinely.[12]

A. Delivery Of Distant Signals Is A Poor Substitute For Delivery Of Local Television Stations

From a policy perspective, there is no benefit—and many drawbacks—to satellite delivery of distant, as opposed to local, network stations. Unlike local stations, distant stations do not provide viewers with their *own* local news, weather, emergency, and public service programming. Nor does viewership of distant stations provide any financial benefit to *local* stations to help fund their free, over-the-air service. To the contrary, distant signals, when delivered to any household that can receive local over-the-air stations, simply siphon off audiences and diminish the revenues that would otherwise go to support free, over-the-air programming.

Members of Congress and other candidates for election are uniquely injured by distant signals: a viewer in Phoenix, for example, will never see political advertisements running on local Phoenix stations if he or she is watching New York or Los Angeles stations from EchoStar or DirecTV instead. Such viewers become virtually unreachable by political advertising, unless (for example) a candidate in Phoenix wishes to purchase advertising on stations in the costliest media markets in the United States—New York and Los Angeles.

B. Satellite Carriers Have Grievously Abused the Distant-Signal Compulsory License

Satellite carriers—most egregiously EchoStar—have systematically abused the distant-signal compulsory license since its creation. To the extent that satellite carriers have complied with the limitations placed by Congress on the distant-signal license, it is solely as a result of litigation that broadcasters were forced to undertake to halt satellite carrier lawbreaking.

From 1988 until 1998, satellite carriers simply ignored the objective "Grade B intensity" standard and instead signed up anyone willing to say that they were dissatisfied with their over-the-air picture. Starting in the mid-1990s, when the large "C-band" dishes began to be replaced by the hot-selling 18-inch dishes offered by DirecTV and EchoStar, the carriers' distant-signal lawbreaking quickly became a crisis.

When DirecTV went into business in 1994, and when EchoStar did so in 1996, they immediately began abusing the narrow distant-signal compulsory license to illegally deliver distant ABC, CBS, Fox, and NBC stations to ineligible subscribers. In essence, the DBS companies pretended that a narrow license that could legally be used only with remote rural viewers was in fact a blanket license to deliver distant network stations to viewers in cities and suburbs.[13]

As a result of EchoStar's and DirecTV's lawbreaking, viewers in markets such as Meridian, Mississippi, Lafayette, Louisiana, Traverse City, Michigan, Santa Barbara, California, Springfield, Massachusetts, Peoria, Illinois, and Lima, Ohio were watching their favorite network shows *not* from their local stations but from stations in distant cities such as New York. Since local viewers are the lifeblood of local stations, EchoStar's and DirecTV's copyright infringements were a direct assault on free, over-the-air local television.

When broadcasters complained about this flagrant lawbreaking, the satellite industry effectively said: if you want me to obey the law, *you're going to have to sue*

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[12] *First,* by the end of the year, DirecTV will offer local-to-local in no fewer than 130 DMAs, which collectively cover more than 90% of U.S. television households. EchoStar already offers local-to-local in 107 DMAs, and that figure is constantly growing. All of the subscribers in these markets (including subscribers claimed to be grandfathered) will be able to receive their local channels by satellite, making the availability of distant signals irrelevant. *Second,* a federal judge found in 2003 that EchoStar forfeited the right to rely on grandfathering by defaulting at trial in proving that any of its subscribers actually satisfy the requirements for grandfathering. *Third,* because of ordinary subscriber churn and relocation, many grandfathered subscribers are no longer DBS customers or are no longer grandfathered. *Fourth,* for the small number of subscribers in non-local-to-local markets that they might claim are currently grandfathered, DirecTV and EchoStar are free to seek (and may already have obtained) waivers from the affected stations. *Finally,* any grandfathered subscriber is (by definition) predicted to receive at least Grade B intensity signals over the air from their local network stations, and thus to be able to view their own stations even if they obtain no network stations by satellite.

[13] For the first few years, DirecTV and EchoStar hid behind a small, foreign-owned company called PrimeTime 24. *See CBS Broadcasting Inc.* v. *PrimeTime 24,* 48 F. Supp. 2d 1342, 1348 (S.D. Fla. 1998) ("PrimeTime 24 sells its service through distributors, such as DIRECTV and EchoStar . . . [M]ost of PrimeTime's growth is through customer sales to owners of small dishes who purchase programming from packagers such as DirecTV or EchoStar."). Starting in 1998 (for EchoStar) and 1999 (for DirecTV), the two companies fired PrimeTime 24 in an effort to dodge court orders to obey the Copyright Act.

me. Broadcasters were finally forced to do just that, starting in 1996, when they sued the distributor (PrimeTime 24) that both DirecTV and EchoStar used as their supplier of distant signals. But even a lawsuit for copyright infringement was not enough to get the DBS firms to obey the law: both EchoStar and DirecTV decided that they would continue delivering distant stations illegally *until the moment a court ordered them to stop.*

The courts recognized—and condemned—the satellite industry's lawbreaking. *See, e.g., CBS Broadcasting Inc.* v. *PrimeTime 24*, 9 F. Supp. 2d 1333 (S.D. Fla. 1998) (entering preliminary injunction against DirecTV's and EchoStar's distributor, PrimeTime 24); *CBS Broadcasting Inc.* v. *PrimeTime 24 Joint Venture*, 48 F. Supp. 2d 1342 (S.D. Fla. 1998) (permanent injunction); *CBS Broadcasting Inc.* v. *DIRECTV, Inc.*, No. 99–0565–CIV–NESBITT (S.D. Fla. Sept. 17, 1999) (permanent injunction after entry of contested preliminary injunction); *ABC, Inc.* v. *PrimeTime 24*, 184 F.3d 348 (4th Cir. 1999) (affirming issuance of permanent injunction).

By the time the courts began putting a halt to this lawlessness, however, satellite carriers were delivering distant ABC, CBS, Fox, and NBC stations to millions and millions of subscribers, the vast majority of whom were ineligible urban and suburban households. *See CBS Broadcasting,* 9 F. Supp. 2d 1333.

By getting so many subscribers accustomed to an illegal service, DirecTV and EchoStar put both the courts and Congress in a terrible box: putting a complete stop to the DBS firms' lawbreaking meant irritating millions of consumers. Any member of Congress who was around in 1999 will remember the storm of protest that DirecTV and EchoStar stirred up from the subscribers they had illegally signed up for distant network stations.

Even when the courts ordered EchoStar and DirecTV to stop their massive violations of the Copyright Act, they took *further* evasive action to enable them to continue their lawbreaking. In particular, when their vendor (PrimeTime 24) was ordered to stop breaking the law, both DBS firms fired their supplier in an effort to continue their lawbreaking.

When DirecTV tried this in February 1999, a United States District Judge found that DirecTV's claims were "a little disingenuous" and promptly squelched its scheme. *CBS Broadcasting Inc. et al* v. *DirecTV,*No. 99–565–CIV–Nesbitt (S.D. Fla. Feb. 25, 1999); *see id.* (S.D. Fla. Sept. 17, 1999) (stipulated permanent injunction).

EchoStar has played the game of "catch me if you can" with greater success, thanks to a series of stalling tactics in court. But in 2003, a United States District Court judge for the Southern District of Florida held a 10-day trial in a copyright infringement case brought by broadcast television networks, and trade associations representing local network affiliates, originally filed against EchoStar in 1998.[14] In June 2003, the District Court issued a meticulously-documented 32-page final judgment, holding EchoStar liable for nationwide, willful or repeated copyright infringement by violating the distant-signal compulsory license. *CBS Broad., Inc.* v. *EchoStar Communications Corp.,* 276 F. Supp. 2d 1237 (S.D. Fla. 2003).

EchoStar had the burden of proving that each of its subscribers receiving distant ABC, CBS, Fox, and NBC stations is an "unserved household." 17 U.S.C. § 119(a)(5)(D). Yet the District Court found that EchoStar had failed to prove that *any* of its 1.2 million distant-signal subscribers is in fact "unserved." That is, EchoStar did not prove that any of its subscribers is unable to receive a Grade B signal, is grandfathered, or is eligible on any other basis. *Id.*, ¶ 82.

Worst of all, the District Court found that EchoStar had deliberately sought to mislead the court about what it did with the vast pool of illegal subscribers it accumulated between 1996 and 1999. Most important, EchoStar made—and then deliberately broke—a sworn pledge (in a declaration by its CEO, Charles Ergen) to turn off the many ineligible subscribers it signed up using the unlawful do-you-like-your-picture method. *Id.*, ¶ 46. Far from turning off its accumulated illegal subscribers, EchoStar knowingly continued delivering distant signals to many hundreds of thousands of customers that it knew—from a study EchoStar itself ordered—to be ineligible. *Id.*, ¶¶ 38–47.

EchoStar's decision to continue its highly profitable lawbreaking was the height of cynicism: as the District Court found, "EchoStar executives, including Ergen and [General Counsel] David Moskowitz, when confronted with the prospect of cutting

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[14] The trial was conducted by the Hon. William Dimitrouleas, who took over the case after the original District Court judge, the Hon. Lenore Nesbitt, passed away in 2002. While Judge Nesbitt also ruled that EchoStar was committing massive copyright infringements, EchoStar was able—by making false claims about its supposed compliance efforts—to obtain a delay in enforcement of that ruling.

EchoStar's appeal of this decision is set to be argued before the 11th Circuit in late February 2004.

off network programming to hundreds of thousands of subscribers, *elected instead to break Mr. Ergen's promise to the Court*." *Id.*, ¶46 (emphasis added). This is, of course, the same EchoStar that now asks Congress to *expand* the distant-signal compulsory license.

C. With The Widespread Availability Of Local-To-Local Service, The Number Of Truly "Unserved" Households Is Minimal

Unlike the local-to-local compulsory license, the distant-signal compulsory license threatens localism and interferes with the free market copyright system. As a result, the only defensible justification for that compulsory license is as a "hardship" exception—to make network programming available to the small number of households that otherwise have no access to it. The 1999 SHVIA Conference Report states that principle eloquently: "the specific goal of the 119 license . . . is to allow for *a life-line network television service to those homes beyond the reach of their local television stations*." 145 Cong. Rec. at H11792–793. (emphasis added).[15]

Today, more than 80% of all U.S. television viewers have the option of viewing their *local* network affiliates *by satellite*—and that number is growing all the time. Even satellite dish owners in local-to-local markets who cannot receive Grade B intensity signals over-the-air (*e.g.*, a household in a remote part of the Washington, D.C. DMA) are obviously not "unserved" by their local stations: they can receive them, with excellent technical quality, directly from their satellite carrier, just by picking up the phone.

The widespread availability of local-to-local network affiliate retransmissions means that, as a real-world matter, *there are no unserved viewers* in areas in which local-to-local satellite transmissions of the relevant network are available, because it is no more difficult for viewers to obtain their local stations from their satellite carriers than to obtain distant stations. There is therefore no policy justification for treating satellite subscribers in local-to-local markets as "unserved" and therefore eligible to receive distant network stations.

The distant-signal compulsory license is *not* designed to permit satellite carriers to sabotage the network/affiliate relationship by delivering to viewers in *served* households—who can already watch their own local ABC, CBS, Fox, and NBC stations—network programming from another source. Yet satellite carriers have aggressively advertised the benefits to served households of obtaining distant signal programming, including most notably:

- time-shifting (*e.g.*, Mountain and Pacific Time Zone viewers watching network programming two or three hours earlier from East Coast stations)
- out-of-town sports: because TV networks often show different sports events (such as NFL games) in different cities, a subscription to an out-of-town network station enables viewers to see sports events that are not televised locally.

These abuses of the compulsory license damage both the network/affiliate system and the free market copyright regime. Consider, for example, a network affiliate in Sacramento, California, a DMA in which there are today no DBS subscribers who are genuinely "unserved" because both DIRECTV and EchoStar offer the local Sacramento ABC, CBS, Fox, and NBC stations by satellite. Nevertheless, for any Sacramento-area viewer who is technically "unserved" under the Grade B intensity standard, DIRECTV and EchoStar can scoop the Sacramento stations with the stations' own programming by offering distant signals from East Coast stations. The Sacramento station—and every other station in the Mountain and Pacific Time Zones that has local-to-local service—therefore loses badly needed local viewers, even though the viewers have zero need to obtain a distant signal to watch network programming.

Similarly, the ability of satellite carriers to offer distant stations that carry attractive sports events is a needless infringement of the rights of copyright owners, who offer the same product—out-of-town games—on a free market basis. For example, the NFL has for years offered satellite dish owners (at marketplace rates) a package

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[15] See, e.g., Copyright Office Report at 104 ("The legislative history of the 1988 Satellite Home Viewer Act is replete with Congressional endorsements of the network-affiliate relationship and the need for nonduplication protection.") (emphasis added); Satellite Home Viewer[] Act of 1988, H.R. Rep. No. 100–887, pt. 2 at 20 (1988) ("The Committee intends [by Section 119] to . . . bring[] network programming to unserved areas while preserving the exclusivity that is an integral part of today's network-affiliate relationship") (emphasis added); id. at 26 ("The Committee is concerned that changes in technology, and accompanying changes in law and regulation, do not undermine the base of free local television service upon which the American people continue to rely") (emphasis added); H.R. Rep. No. 100–887, pt. 1, at 20 (1988) ("Moreover, the bill respects the network/affiliate relationship and promotes localism.") (emphasis added).

called "NFL Sunday Ticket," which includes all of the regular season games played in the NFL. The distant-signal compulsory license creates a needless "end-around" this free-market arrangement by permitting satellite carriers to retransmit distant network stations for a pittance through the compulsory license.

IV. THE DBS INDUSTRY'S PROPOSAL TO *EXPAND* THE DISTANT-SIGNAL COMPULSORY LICENSE DEFIES LOGIC AND WOULD SET BACK LOCAL-TO-LOCAL CARRIAGE OF DIGITAL SIGNALS FOR YEARS

Having elected to deliberately violate the limits that Congress imposed on the existing compulsory license unless and until ordered by a federal court to obey them, EchoStar and DirecTV now demand that Congress radically *expand* the distant-signal license they have abused. The Committee should reject this irresponsible proposal out of hand.

In essence, the DBS firms ask the Committee to create a brand-new compulsory license to permit them to deliver the digital broadcasts of the New York and Los Angeles ABC, CBS, Fox, and NBC stations to millions of households nationwide, even though (a) the households can receive the *same programming* over the air from their local station's analog signal and (b) in the overwhelming majority of cases, EchoStar and DirecTV already deliver the *same programming* via what SBCA describes as "a 100 percent, crystal-clear digital audio and video signal" retransmitted from the local station's analog broadcasts.

The simple greed behind this DBS industry proposal is clear, and the tactic is familiar. In the 1990s, the DBS industry sought to offer network broadcast programming "on the cheap" by delivering the analog broadcasts of New York and Los Angeles stations nationwide—completely bypassing the network/affiliate system that Congress and the FCC have worked so hard to foster. (Indeed, in the 1990s satellite companies urged Congress to eliminate the "unserved household" restriction entirely and to permit *universal* distribution of New York and Los Angeles stations in return for payment of a "surcharge.") This Committee, and Congress as a whole, blocked those maneuvers, instead insisting on localism and on marketplace solutions. By standing its ground against the "quick fix" urged by the DBS industry, Congress has fostered the win/win/win result described above: DirecTV and EchoStar (and their contractors) dug deep to find technical solutions to enable them to offer *local-to-local* broadcast programming to the overwhelming majority of U.S. television households—and soon to all of them. (They found these solutions, of course, only after repeatedly telling Congress and the FCC that the technical problems were unsolvable.)

The DBS industry's current proposal is equally self-serving. EchoStar and DirecTV would enjoy a tremendous financial benefit from being able—again "on the cheap"—to deliver the digital broadcasts of New York and Los Angeles ABC, CBS, Fox, and NBC stations to many millions of viewers nationwide. Instead of investing in delivering *local* digital broadcasts, as cable systems are gradually beginning to do, DirecTV and EchoStar could use a single, inexpensive *national* feed (*e.g.*, of WCBS in New York) to deliver digital programming of a particular network around the country. Although this gambit would cost the DBS firms virtually nothing, they would gain enormously, both in additional customers (at $40, $50 or more per month) and in selling additional network packages (at $6 per month) to both old and new customers.

While the "distant digital" proposal would be a tremendous windfall for DirecTV and EchoStar, it would be a disaster for Congress, the public, and broadcasters. As discussed in detail below, the supposed "factual" basis for this proposal—that the broadcast television industry has not been diligent in pushing the digital transition—is palpable nonsense. And as also described below, this gift to the DBS industry would come at a crippling cost in terms of Congress' public policy objectives.

A. The Broadcast Industry Has Spent Enormous Sums and Dedicated Extraordinary Efforts to Implementing the Transition to Digital Broadcasting—With Tremendous Success in Rolling Out Digital to the Vast Majority of American TV Households

Contrary to the satellite industry's ill-informed accusations, broadcasters have worked tirelessly to implement the transition to digital broadcasting. Thanks to the expenditure of billions of dollars and millions of person-hours, broadcasters have built—and are on-air with—digital television ("DTV") facilities in 203 markets that serve 99.42% of all U.S. TV households.[16] Midway through the transition, almost

[16] National Association of Broadcasters, *DTV Stations in Operation*, http://www.nab.org/Newsroom/issues/digitaltv/DTVStations.asp (last checked Feb. 19, 2004).

three-quarters—73.7%—of U.S. television households have access to *at least six* free, over-the-air digital television signals.[17] Nationwide, 1380 television stations in 203 markets are delivering free, over-the-air digital signals today.[18] More than 70 million households receive six or more DTV signals; 49 million households receive *nine* or more DTV signals; and a full 30 million households receive *12* or more DTV signals. More digital stations are resolving their obstacles and going on the air almost daily. The digital transition is working and moving ahead quickly, and the claims of the satellite industry to the contrary are empty rhetoric, not fact.

In the top ten markets, covering 30% of U.S. households, all top four network affiliates are on-air—38 with licensed full-power digital facilities and two New York city stations with Special Temporary Authority ("STA") currently covering a significant chunk of their service areas and with plans to expand even more. In markets 11–30 (representing another 24% of U.S. households), 77 of 79 top four affiliated stations are on-air—72 with full-power licensed digital facilities and five with STAs. Two other stations in that group have been stymied in their roll-out, but are reporting regularly to the Commission about their progress in overcoming the obstacles. Thus, virtually *all* ABC/CBS/Fox/NBC affiliates in the top 30 markets, representing 53.5% of all U.S. households, are on-air with DTV—110 stations with full power licensed digital facilities and seven with STAs.[19]

Even as to smaller stations in these markets and stations in smaller markets—which have far fewer resources but equally high costs—1263 of 1569 stations are on air with digital,[20] having overcome enormous challenges and in many cases mortgaging their stations to do so, despite having no immediate prospect of revenues to offset these huge investments.

Those who do not understand the digital transition sometimes claim that DTV stations operating with STAs broadcast with very low power. That is simply wrong. Many stations, particularly those outside the largest stations in the largest markets, are "DTV maximizers," *i.e.*, are maximizing their power to greatly *exceed* their analog coverage. Many maximizers need only a fourth or less of their maximum (licensed) power to cover their entire analog service area. Maximizers operating at even much reduced power are still covering 70% or more of their analog service areas. Almost 19% of current DTV stations operating pursuant to STAs currently serve *more* than 100% of their analog service area with a digital signal.[21] This number will expand exponentially as the transition continues. This high percentage is particularly striking given that there are still no FCC rules for digital translators or booster stations, which will further expand digital signals in rural areas (at still further cost to local broadcasters). Free, over-the-air broadcasters take seriously the potential for expanding their service area and diminishing the very small number of households nationwide that cannot receive local signals, and the digital transition will provide an opportunity to increase nationwide broadcast service.

An authoritative study from last fall shows that on-air DTV facilities are serving 92.7% of the population served by the corresponding analog stations.[22] The small percentage of viewers who do not yet receive a fully replicated digital signal of their local television stations is shrinking by the day as broadcasters work hard, at great expense, to expand the coverage of their digital stations.

On the programming side, broadcasters, both networks and local stations, are providing an extraordinary amount of high-quality DTV and high-definition television ("HDTV") programming to entice viewers to join the digital television transition and purchase DTV sets to display the glory of dazzling HDTV programs and the multiple offerings of the growing DTV multicasts. Three networks offer virtually all their prime time programming in HDTV, as well as high-profile specials and sporting events, such as

- The Academy Awards
- The Grammys
- 11 National Hockey League playoff games
- The Kentucky Derby
- The Super Bowl
- The AFC Championship

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[17] *See* Mark R. Fratrik, Ph.D, *Reaching the Audience: An Analysis of Digital Broadcast Power and Coverage* (BIA Financial Network, Oct. 17, 2003) (prepared for the Association for Maximum Service Television, Inc.) ("MSTV Study").

[18] *See* www.fcc.gov/mb/video/dtvstatus.html ("FCC statistics").

[19] *Id.*

[20] *Id.*

[21] *See* MSTV Study, *supra*, at 16.

[22] MSTV Study, *supra*, at i.

- Masters' Golf
- US Open Tennis
- College football
- NCAA Tournament games
- The Stanley Cup
- The NBA Finals
- The primary NFL games of the week
- The entire schedule of Monday Night Football

PBS is launching its HD Channel, in addition to its multicast channels of educational fare. WB is doubling its amount of HD programming this fall to account for more than half of its program schedule. PAX is multicasting on its digital channels, including prime time fare. And now many special effects, like the first-down marker and graphics, are also going high definition, to enhance the viewer experience and move the transition along faster and faster.

While it is local stations that bring these national HDTV programs to the vast majority of viewers, these local stations also are doing more and more on the local level to supplement the network HDTV and multicast fare. Examples abound of local HDTV and multicast broadcasts (at an enormous cost for full local HD production facilities):

- WRAL-TV produces its local news in HDTV
- Post-Newsweek's Detroit station broadcast live America's Thanksgiving Day Parade in HD
- WRAZ-TV in Durham NC broadcast 10 Carolina Hurricanes hockey games in HD last winter
- KTLA in LA broadcast last January's Rose Parade in HD in a commercial-free broadcast simulcast in Spanish and closed captioned and repeated it throughout the day and distributed it on many Tribune and other stations
- Last April, Belo's Seattle station KING-TV began producing its award-winning local programs Evening Magazine and Northwest Backroads in HDTV. Evening Magazine is daily. These programs are broadcast on Belo's other Seattle and Portland and Spokane stations
- KTLA last March broadcast live LA Clippers and the Lakers in HD. It was the third sports presentation by KTLA, which included two Dodgers games
- Many public TV stations are providing adult and children's education, foreign language programming and gavel-to-gavel coverage of state legislatures
- NBC and its affiliates are planning a local weather/news multicast service
- ABC is multicasting news/public affairs and weather channels at its KFSN station in Fresno, Calif. It plans to replicate this model at the nine other stations it owns.
- WKMG in Orlando plans to broadcast a Web-style screen with local news, weather maps, headlines and rotating live traffic views.

This ever-increasing variety of DTV and HDTV programming, being broadcast to the vast proportion of American households, will attract consumers to purchase DTV sets. Another major driver of the transition is the FCC's August 2002 Tuner Order, which requires all new television sets, on a phased-in basis and starting this summer with the half of the largest sets, to have a DTV tuner. As a result, DTV tuners will be available in an ever-increasing number of households, thereby further hastening the transition.

In short, the suggestion that broadcasters have somehow failed America in the transition to digital broadcasting is demonstrably false. And the notion that new compulsory license for "digital white areas" would *improve* matters is sheer fantasy. In fact, allowing satellite carriers to deliver distant digital (or HD) signals to so-called "digital white areas" would set the stage for a consumer nightmare almost identical to what occurred in 1999, when hundreds of thousands of households had to switch from (illegally-delivered) distant signals to over-the-air reception of local stations.

The reason is simple: as Congress painfully experienced from mountains of letters, emails, and phone messages in 1999, viewers who are accustomed to receiving all of their TV programming (including network stations) by satellite are often enraged when told that they must switch to a hybrid system in which they combine satellite reception with an off-air antenna or cable service. The import of the "distant digital" proposal is therefore clear: after the DBS firms had "grabbed" customers with a dis-

tant digital signal, the costs to local broadcast stations of reclaiming those viewers would go sky-high, since stations would face not only the same financial costs they do now but *also* the high costs of confronting thousands of angry local viewers with the need to change their reception setup. The DBS firms know all of this, and they fully understand the implication: the "distant digital" plan would *not* encourage a smooth digital transition, and would *not* encourage stations to invest in the digital rollout, but would simply make it easy for EchoStar and DirecTV to hook customers on (distant) satellite-delivered digital signals and keep them forever.

If there were any doubt about the DBS firms' tenacity in retaining distant-signal customers once they begin serving them—regardless of the legality of doing so—EchoStar's behavior with regard to analog distant signals would eliminate it. As a District Court found last year after a 10-day trial, EchoStar was so determined to retain its illegal distant-signal customers that, "when confronted with the prospect of cutting off network programming to hundreds of thousands of subscribers," the key "EchoStar executives, including [CEO Charles] Ergen and [General Counsel] David Moskowitz," choose instead "to break Mr. Ergen's promise to the Court" that it would turn them off. *CBS Broad., Inc.* v. *EchoStar Communications Corp.,* 276 F. Supp. 2d at 1246, ¶ 46.

B. The Radical New Compulsory License Demanded by EchoStar and DirecTV Is Unnecessary and Would Do Lasting Damage to Localism

At all times since 1988, the purpose of the distant-signal license has been to make over-the-air broadcast programming available by satellite solely as a "lifeline" to satellite subscribers that had no other options for viewing network programming.[23] The EchoStar/DirecTV proposal would do exactly the opposite: Congress would override normal copyright principles to permit DBS companies to transmit distant network stations to many millions of additional households, even though (1) the households get a strong signal from their local stations over the air and (2) in most cases, the DBS firm already offers the local analog broadcasts of the same programming, in crisp, digitized form, as part of a local-to-local package. The suggestion that Congress needs to step in to offer a "lifeline" under these circumstances is baffling.[24]

The consequences of this radical proposal, if adopted, would be likely to be grave. According to EchoStar and DirecTV, for example, if a station (through no fault of its own, *e.g.*, because of a local zoning obstacle) has been unable to go on-air with a digital signal , *every household in that station's market* would be considered "unserved"—and therefore eligible to receive a retransmitted signal from the New York or Los Angeles ABC, CBS, Fox, and NBC affiliates' digital broadcasts. In these markets, EchoStar and DirecTV would take us back to the dark days of the mid-1990s, when, before courts began to intervene, the DBS firms used national feeds to deliver ABC, CBS, Fox, and NBC network programming to any subscriber who asked for it.[25] And they would do so even though, in most cases, the DBS firms are themselves already delivering the same programming by satellite from the local stations. With DBS penetration already at more than 20 million households nationwide, and with the highest levels of DBS penetration in smaller markets, the impact on the viability of local broadcasters could be devastating.[26] Worse yet, based on the misconduct of EchoStar in their retransmission of distant analog signals, once EchoStar has begun delivering distant digital stations, it will take enormous efforts (and years of struggle) to get them to ever stop doing so, even if they have "promised" to do so, and even if the law squarely requires them to do so.

Granting this enormous government subsidy to the DBS industry, at the expense of local broadcasters (and ultimately at the expense of local over-the-air audiences),

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[23] *E.g.*, SHVIA Conference Report, 145 Cong. Rec. H11792 ("the specific goal of the 119 license, which is to allow for *a life-line network television service to those homes beyond the reach of their local television stations* must be met by *only* allowing distant network service to those homes which cannot receive the local network television stations. Hence, the 'unserved household' limitation that has been in the license since its inception." *Id.* (emphasis added).

[24] The Committee should be aware that, in the guise of a letter seeking advice about how to fill out a Copyright Office form, EchoStar sought last year to obtain from the Copyright Office a statement that the Copyright Act *as now in force* already recognizes the "distant digital" concept. *See* Letter from David Goodfriend, EchoStar Communications Corp. to David O. Carson, General Counsel, Copyright Office (June 18, 2003). The Office swiftly, and properly, rebuffed that back-door effort. Letter from William J. Roberts to David Goodfriend (Aug. 19, 2003).

[25] In other markets, while stations have gone on-air with their digital signals, their coverage area is temporarily reduced for reasons entirely beyond their control—such as the destruction by terrorists of the World Trade Center and its broadcasting facilities.

[26] Of course, the tiny number of *genuinely unserved* households (*e.g.*, those unable to receive Grade B intensity analog signals over the air) can receive either an analog or a digital signal from a distant affiliate of the same network. *See* Letter from William J. Roberts, U.S. Copyright Office, to David Goodfriend (Aug. 19, 2003).

would also have profoundly negative long-term consequences for the continued progress of the satellite industry. Over-the-air broadcasting is a *local* phenomenon, and the right way to deliver local stations is on a local-to-local basis. In their drive to compete with cable, and with each other, DirecTV and EchoStar are likely to devise ingenious technical solutions to enable them to carry digital broadcasts on a local-to-local basis, just as they have—despite their gloomy predictions—found a way to do so for analog broadcasts. But rewriting the laws to give EchoStar and DirecTV a cheap, short-term, government-mandated "fix" will take away much of the incentive that would otherwise exist to continue to find creative technological solutions. Congress wisely refused to abandon the bedrock principles of localism and free market competition in the 1990s, when the satellite industry made similar proposals, and Congress should do the same now.

The DBS proposal would also sabotage another key objective of the SHVIA, namely minimizing unnecessary regulatory differences between cable and satellite. If DirecTV and EchoStar could deliver an out-of-town digital broadcast to anyone who does not receive a digital broadcast over the air, they would have a huge (and wholly unjustifiable) leg up on their cable competitors, which are virtually always barred by the FCC's network non-duplication rules from any such conduct. *See* 47 C.F.R. §§ 76.92–76.97 (1996).

Finally, it would be particularly inappropriate to grant EchoStar and DirecTV a vastly expanded compulsory license *when they have shown no respect for the rules of the road that Congress placed on the existing license*. If Congress were to adopt this ill-conceived proposal, it can expect more years of controversy, litigation, and—ultimately—millions of angry consumers complaining to Congress when their "distant digital" service is eventually terminated. This Committee should rebuff the invitation to participate in such a reckless folly.

V. WHAT CONGRESS SHOULD DO THIS YEAR

As the Committee is aware, the local-to-local compulsory license is permanent, but Congress has wisely extended the distant-signal license (in Section 119 of the Copyright Act) only for five-year increments. Given the short legislative calendar and the press of other urgent business, Congress may wish simply to extend Section 119, as now in force, for another five years.

If Congress wishes to do anything other than a simple extension of the existing distant-signal compulsory license, NAB urges:

- **No distant signals where local-to-local is available.** For the reasons discussed above, Congress should amend the definition of "unserved household" to exclude any household whose satellite carrier offers the household's own network stations on a local-to-local basis. There is no logic to interfering with localism—and with basic copyright principles—under these circumstances. It makes no sense, for example, to give satellite carriers the right to "scoop" local stations on the West Coast (and in the mountain West) by delivering *8 Simple Rules*, *Everybody Loves Raymond*, *24,* or *The Tonight Show* two or three hours early, or to permit EchoStar to evade normal copyright restrictions by delivering out-of-town NFL games to local-to-local households without ever negotiating for the rights to do so.
- **No expansion of the distant-signal compulsory license.** Congress should flatly reject any proposal to *expand* the distant-signal compulsory license, such as the irresponsible "distant digital" proposal discussed above. Since the compulsory license is intended only to address "hardship" situations in which viewers have no other means of viewing network programming, there is no policy basis for *expanding* the compulsory license to cover households that receive can view their local station's analog signals over the air. Still less would it make any sense to declare a household to be "unserved" when it already receives (or can receive with a phone call) a crisp, high-quality digitized retransmission of their local station's analog broadcasts from DirecTV or EchoStar.

  The Committee not take seriously the DBS firms' predictable claims that they lack the technological capacity over time to offer local digital signals, since—as discussed above—EchoStar and DirecTV are notorious for "underpredicting" their ability to solve technological challenges. Moreover, it would be wholly inappropriate to reward companies such as EchoStar, which have

knowingly violated the existing law and broken sworn promises to courts about compliance, by *broadening* the compulsory license they have abused.[27]

- **Five-year sunset.** Congress should again provide that Section 119 will sunset after a five-year period, to permit it to evaluate at the end of that period whether there is any continuing need for a government "override" of this type in the free market for copyrighted television programming.
- **Stopping the "two-dish" scam.** As discussed above, Congress should—if the FCC does not do so first—bring a halt to EchoStar's two-dish gambit, which is thwarting Congress' intent to make all stations in each local-to-local market equally available to local viewers.

CONCLUSION

With the perspective available after 16 years of experience with the Act, the Committee should adhere to the same principles it has consistently applied: that localism and free-market competition are the bedrocks of sound policy concerning any proposal to limit the copyright protection enjoyed by free, over-the-air local broadcast stations.

If the Committee makes any change to the existing distant-signal license, it should amend the Act to specify that a household that can receive its own local stations by satellite from the satellite carrier is not "unserved." The Committee should flatly reject reckless bids by companies like EchoStar—which have scoffed at the law for years—to *expand* the distant-signal license.

Far from rewarding EchoStar for its indifference to congressional mandates, Congress should—if the FCC does not—make clear that EchoStar's flouting of "carry one, carry all" through its two-dish gambit must come to an end. And as it has done in the past, Congress should limit any extension of the distant-signal license to a five-year period, to enable a fresh review of the appropriateness of continuing this major governmental intervention in the free marketplace.

APPENDIX A

RECENT EXAMPLES OF LOCAL TV STATION PUBLIC SERVICE

Helping People In Need

WXYZ 'Can Do' Raises 500,000 Pounds of Food for Food Banks

WXYZ-TV Detroit (E.W. Scripps-owned ABC affiliate) undertook its 22nd annual "Operation Can-Do" campaign this winter, bringing in more than 500 thousand pounds of canned and non-perishable food to help feed families and individuals through soup kitchens and food banks in the tri-county area. Since it began the program, WXYZ has collected more than six million pounds of food, providing more than 20 million meals to the hungry of Metropolitan Detroit. (Jan/Feb 2004)

WHSV-TV Builds a Habitat House

WHSV-TV Harrisonburg, VA (Gray Television-owned ABC affiliate) decided the best possible way to celebrate its October 2003 50th Anniversary would be to partner with Habitat for Humanity to raise $50 thousand over the summer to build a house for a needy family. January 2003 marked the first time that the Staunton-Augusta-Waynesboro Habitat affiliate partnered with a television station to build a house and show the public the Habitat miracle. WHSV had several fundraisers, including production and distribution of a Shenandoah Valley cookbook commemorating the station's 50 years of service and the Habitat chapter's 10 years of service. In August, WHSV hosted a special benefit screening of "From Here to Eternity," which won the Academy Award in the same year WSVA-TV (now WHSV) sent out its first broadcast. Community members who supported the screening were driven by limousine to the theater and entered on a red carpet. WHSV sent out calls for

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[27] EchoStar's callous disrespect for legal requirements extends well beyond litigation with broadcasters. In a lawsuit filed by EchoStar claiming antitrust violations for alleged conspiracy and boycott, for example, a United States Magistrate Judge recommended Rule 11 sanctions against EchoStar and its in-house counsel. Recommendation of United States Magistrate Judge, *EchoStar Satellite Corp.* v. *Brockbank Ins. Servs., Inc.*, No. 00–N–1513 at 19 (D. Colo. Nov. 6, 2001) (Exhibit A hereto). The court held that "the complaints filed [by EchoStar] in this action were nothing but an effort to involve the insurers in expensive litigation in an attempt to force the insurers to increase their settlement offers or to pay a total loss on the EchoStar IV claim." *Id.* at 25. The court also found that "Echostar acted with an improper purpose in violation of Rule 11(b)(1)" and acted "in bad faith." *Id.*

and coordinated volunteers throughout the fundraising and building process. The station met its goal, the house was built and a grateful family of four moved in. (Jan/Feb 2004)

Children

WFAA-TV Collects 82,000 Toys in Four-Week Campaign

WFAA-TV Dallas/Fort Worth (Belo-owned ABC affiliate) in 2003 ran its most successful Santa's Helpers campaign in the 34-year history of this program. WFAA was able to collect more than 82,000 toys over the course of the four-week campaign, allowing the station to help more than 50,000 children in the North Texas area. In 2002 the station collected 76,000 toys. Santa's Helpers is promoted on air through numerous promos and PSAs, and also by WFAA's chief weathercaster, Troy Dungan, who has served as Santa's Helpers spokesman for 28 years. Each year, the highlight of the campaign is a "drive-thru" event that is held in front of the station, where WFAA anchors and reporters greet viewers as they drop off toys. After all of the toys have been collected, they are distributed to needy children by more than 40 nonprofit organizations in the Dallas/Fort Worth area. (Jan/Feb 2004)

Healthy Communities

KTTC-TV: 50 Years On-Air, 50 Years Fighting Cancer

KTTC-TV Rochester, MN (QNI Broadcasting-owned, NBC) celebrated its 50th anniversary in July and nearly 50 years of partnership with the local Eagles Lodge producing and airing a 20-hour telethon to raise money for cancer research. Fifty years ago young Rochester television sportscaster Bernie Lusk was searching for a way to use the powerful new medium of television to make a difference. At a time when the battle with polio garnered much attention, Bernie wanted to tackle another disease that claimed many lives—cancer. Bernie shared his idea with fellow Eagles Lodge members, and the now 50-year-old, totally local telethon was born.

In its first year, the 1954 KTTC/Eagles Cancer Telethon raised $3,777. In 2003, $702,900 was raised for the Mayo Clinic, the University of Minnesota, and the Hormel Institute of Research. To date the telethon has raised more than $9 million dollars. (Nov/Dec 2003)

KLAS-TV Promotes Breast Cancer Awareness

KLAS-TV Las Vegas (Landmark Broadcasting, CBS) runs the Buddy Check 8 program asking viewers to call a buddy on the 8th day of the month to remind her to do a breast self-examination. KBLR-TV (Telemundo) also produces the same messages in Spanish. (September 2003)

Helping Animals

KEYE Raises $172,000 for Humane Society

KEYE-TV Austin, TX (Viacom, CBS) hosted the Austin Humane Society's 6th Annual Pet Telethon June 20 and 22, raising $172,000 and resulting in the adoption of 104 animals. The society runs a no-kill shelter, where animals accepted into the adoption program are kept for as long as it takes to find them a loving home. The society has saved approximately 2,700 animals in the past year alone. (July 2003)

Drug Prevention

Hawaii TV Stations Forego New Network Shows to Blanket Islands with Drug Documentary

Television stations in the Hawaiian Islands simultaneously aired an unprecedented, commercial-free drug documentary at 7 p.m. on September 24, with network affiliates pre-empting the first hour of primetime during the networks' debut of their new fall shows. The stations were honoring their commitment to help battle Hawaii's biggest drug problem. "Ice: Hawaii's Crystal Meth Epidemic," produced by Edgy Lee's FilmWorks Pacific, details the epic proportions of crystal meth abuse, with grassroots reaction and views. Originally conceived as a 30-minute show, it was expanded to an hour because of the magnitude of the epidemic and originally was to air in August to avoid the fall network season. The commercial-free airing agreement did not come without a cost. It meant thousands of dollars in lost ad revenues for the stations and the canceling or delayed airing of the season premieres of "Ed," "60 Minutes II," "My Wife and Kids" and "Performing As." KITV-TV (Hearst Argyle, ABC) general manager Mike Rosenberg estimated the loss was as much as $10 thousand per station. Stations that simulcast the program included: Honolulu stations KITV-TV (Hearst Argyle, ABC), KBFD (Independent), Raycom Media stations KHNL (NBC) and KFVE (WB), KIKU (International Media Group, Independent), Emmis Communications stations KHON (Fox) and KGMB (CBS) and

KWHE (Independent). Some stations even added additional ice programming to follow Lee's film. Among them were KHON, which showed an hour-long panel including Governor Linda Lingle and Lt. Governor James Aiona; and KFVE, which aired a half-hour program focusing on teen drug usage. (October 2003)

Broadcasters Without Borders

Roanoke Station's Viewers Come Through for Troops

A six-day promotion at WDBJ-TV Roanoke, VA (Schurz Communications, CBS) to gather items such as toiletries and snack foods for American troops serving in the Iraq war resulted in more than two tons of welcome supplies. Viewers overwhelmed the station and collection points at several Roanoke area automobile dealerships with more than 4,000 pounds of Packages from Home to be sent overseas. The American Red Cross local chapter helped get the goods to the Middle East. "Thursday and Friday afternoons, the cars were bumper to bumper at our front door," said WDBJ President and General Manager Bob Lee. "We filled up the lobby, and then the packages started to spill over into other areas of the building." Red Cross and station volunteers sorted the DOD-approved personal items. Said Lee, "Who would have thought we would end up with more than two tons of merchandise! We were beginning to think we'd need our own C–130 for the delivery." (April 2003)

Education

KTLA Student Scholarships

KTLA-TV Los Angeles (Tribune-owned WB affiliate) is launching its sixth Annual Stan Chambers Journalism Awards competition—a partnership with area county departments of education and member school districts. The station has invited more than 300 high schools to have their seniors submit essays on "What Matters Most," for the opportunity to receive scholarships to further their education. Five winners will receive $1,000 and a chance to experience work in the KTLA Newsroom. Winners will produce videos of their entries, with guidance from KTLA News writers, producers and reporters. The program honors KTLA's veteran reporter and journalist Stan Chambers for his contributions to the community. (Jan/Feb 2004)

KRON-TV's 'Beating the Odds'

KRON-TV San Francisco's "Beating the Odds" is a series of news stories and specials reported by anchorwoman Wendy Tokuda and other KRON News reporters. Tokuda's "Beating the Odds" series features extraordinary high school students who are rising above tough circumstances. Some are growing up without parents, others are homeless and some are raising siblings. All of them want to go to college. The stories are tied to a scholarship fund established by KRON and the Peninsula Community Foundation to help low-income, high-risk Bay Area high school students pay for college. Following each "Beating the Odds" report, viewers are encouraged to donate to the fund. Since 1997, the fund has raised more than $1.5 million for students profiled in the series. The Foundation waives all its fees, so 100% of the tax-deductible donations go to the students. KRON is an independent station owned by Young Broadcasting. (March 2003)

Belo/Phoenix Launches Statewide Education Initiative

Belo Broadcasting/Phoenix has launched a six-month, statewide initiative on education to address major issues affecting students and schools. Running through March, "Educating Arizona's Families" involves monthly topics ranging from early brain development and learning readiness to literacy, accountability, dropout, post-secondary education, the teaching profession and the economic impact of education on the state. The stations focus on each initiative for one month, producing two dozen stories per topic. Weekly public affairs programming is directed toward the specific issues being covered each month and guests on mid-day newscasts, three times weekly, offer insight to parents, caregivers and other viewers. KTVK-TV Phoenix (Independent) is driving the initiative through news and daily promotional announcements that also air in Tucson on Belo's KMSB-TV (Fox) and KTTU-TV (UPN). Promotion spots change monthly and individual 30-second sponsor announcements address education interests of each sponsor. (Nov/Dec 2003)

Protecting the Environment/Endangered Species

Emmis Makes $90,000 Grant to Indianapolis Zoo For Endangered Species

Radio and television station owner Emmis Communications will donate $90,000 to the Indianapolis Zoo for a multi-year conservation research project aimed at saving one of the planet's most endangered species, the ring-tailed lemur. A portion of the donation will be used to research potential problems that could occur from the

re-introduction of the animals into the wild from zoos around the world, paving the way for future reintroduction of the species into their native range. (January 2002)

Mr. SMITH. Ms. Peters, let me direct my first question toward you but, first of all, preface it by saying that in your testimony, both written and oral, you suggested two amendments, both of which I think are non-controversial. One is eliminating the outdated provisions and the other is coming up with a new signal intensity standard for TV stations that broadcast in digital.

Now what that standard is may be controversial, but I think the idea that we have to come up with a new standard is not. So what I want to do is ask you a couple of other questions. The first one is: What do you think of Mr. Moskowitz's suggestion that there be parity between cable and satellite when it comes to the statutory licenses?

Ms. PETERS. We actually, in general, believe that there should be parity. There are certain provisions, but, for us, we were focusing much more when we did our study, and we stayed there today, with the fact that we believe in marketplace rates. It is a statutory license. We think that a lot of the things that are wrong are in the cable license, not the satellite license.

Mr. SMITH. Okay, so you do not think that the historical, technological, regulatory, and sometimes different tax treatments would justify something other than parity?

Ms. PETERS. No, I think that there are perhaps some instances where parity may not work, but to the extent that it is possible, I think there should be parity. But I would aim toward the satellite standard, rather than to go——

Mr. SMITH. Go that direction rather than the other.

Ms. PETERS. Yes.

Mr. SMITH. Okay, thank you, Ms. Peters.

Mr. Attaway, in both your written and oral testimonies, I am going to read from your prepared remarks, you made the point that, since 1998, the satellite services have increased their charges for distant broadcasting programming by 20 percent, but copyright royalty payment for that programming has been reduced by 30 percent. Why do you think that is?

Mr. ATTAWAY. Well, when Congress accepted the statements of the satellite industry in 1999 and reduced the marketplace compulsory license rates by 30 or more percent, I think Congress thought that this savings would be passed on to consumers. That did not happen.

I have seen no evidence that the prices charged by the satellite carriers went down in 1999 or any other time. They keep going up. And what this compulsory license is is simply a wealth transfer. Congress is taking money out of the pockets of program owners and putting it in the pockets of the satellite distributors.

Mr. SMITH. Okay. Mr. Moskowitz, you probably anticipated my question, which is: Why the 20 percent increase in charges and the 30 percent decrease in royalties?

Mr. MOSKOWITZ. Well, the only time that satellite—and I guess I can only speak for EchoStar here, because I don't know about DirecTV's price increases—but the only time EchoStar has ever raised its prices on distant programming was a couple of years ago when we added PBS to our line-up, and so we did increase the

price to reflect the fact we were adding an additional channel to the line-up. Now, so we have kept prices steady, notwithstanding the fact that our costs are very significant.

People think: Well, gee, they just get the programming and that is the beginning and the end of it, but, of course, that is not the case at all. We have to back-haul it to a facility. We have to then uplink it to a satellite. We have to pay for the construction and launch of these satellites at a cost of $250 million each. We have to comply with very burdensome regulations, with respect to the SHVIA, which we are comfortable complying with, but they are not without very significant costs. And so it is really kind of inaccurate to say that there aren't significant costs involved in doing this.

Mr. SMITH. Okay, fair enough.

Mr. Lee, of all the proposals made by Mr. Moskowitz, which is the least attractive to the National Association of Broadcasters?

Mr. LEE. Mr. Chairman, it would have to be this digital white space——

Mr. SMITH. White space.

Mr. LEE.—notion.

The fact is, most of what we know about digital television was created in a computer simulation. You may recall there was limited field testing of digital television here in Washington, I think down in the Charlotte area, and then we all galloped off to do digital television.

At our station, we've spent about $14 million on equipment. My power bill alone went up about $72,000 a year to operate the digital transmitter, and the coverage pattern predicted by the FCC's computer models was said to replicate the footprint of our analog NTSC signal. What we found, in fact, is digital travels much further than anybody expected and it is much more robust, but it has some holes in it, and, frankly, nobody knows why yet. There is some testing occurring out West, I think primarily in the Salt Lake area, to understand how on-channel translators will work in digital.

We are most eager to see the outcome of that, and—frankly, I am the only lawyer in the room, I think, so I am not sure I am able to say this—the broadcaster experience with EchoStar leaves us so cautious, we just think that once the camel gets his nose under the tent anything can happen.

It is just a bad idea, and I urge you to forget it.

Mr. SMITH. Thank you, Mr. Lee.

The gentleman from California, Mr. Berman, is recognized for his questions.

Mr. BERMAN. Thank you, Mr. Chairman.

To Mr. Attaway, you recommend increasing the section 119 royalty rates. Mr. Moskowitz recommends lowering them. Mr. Moskowitz bases his recommendation on the argument that section 119 rates should equal cable's rates under section 111. Mr. Moskowitz indicates that cable pays far lower per subscriber royalty fees than satellite carriers. Do you agree with that statement?

Mr. ATTAWAY. Absolutely not.

I agree with the statement that there is not parity, but the parity—the lack of parity is in satellite's failure, at least according to the research I have done.

The dish superstation package of EchoStar includes five distant independent stations for which they charge $5.99, and they pay 94.5 cents in compulsory license royalties. Now the same package, if it were carried by the San Antonio cable system, would cost that cable system $1.50 per subscriber per month. At the Century TCI cable system in Los Angeles, it would pay $3.53 for that package of distant independent television stations; and here in Montgomery County, Comcast would pay $2.12 for that very same package.

Mr. BERMAN. What about western Virginia?

Mr. ATTAWAY. I am sorry, I didn't look in western—Mr. Boucher, I do apologize to you. I will go back tonight and look that up and send it to you tomorrow.

Mr. BOUCHER. Actually, I think Mr. Berman asked the question. You should send it to him.

Mr. ATTAWAY. Well, the point is, Mr. Berman, there does not seem to be parity, but it does seem to work in satellite's favor. Satellite pays far less for a package of distant independent television stations than many and I believe most cable systems would pay.

Mr. BERMAN. Thank you.

Mr. Moskowitz, when you testified before the Subcommittee 5 years ago, I asked you whether some EchoStar subscribers were receiving distant signals via satellite even though they could receive a local signal of grade A intensity by a rooftop antenna. You replied, quote: I can tell you that EchoStar does not sign up customers in grade A unless we actually go out and do a test and find that the consumer does not get a grade B signal.

In a 2003 decision, the U.S. District Court for the Southern District of Florida found that EchoStar was delivering distant network stations to more than 630,000 subscribers who were predicted to receive a grade A signal from at least one of the four networks.

The court further found that EchoStar has failed to present credible evidence, either in the form of an ILLR analysis or signal intensity measurements, that any of its subscribers are unserved as defined under the Satellite Home Viewer's Act.

It also found no credible evidence that EchoStar turned off distant signals to any of these grade A subscribers.

In other words, the court found EchoStar had signed up hundreds of thousands of customers in grade A areas without doing any of the tests you assured me it had done. In light of this, how do you expect us to feel comfortable that your proposal for addressing digital white areas won't create another grandfathering problem?

Mr. MOSKOWITZ. Congressman, I think there are several things to talk about with that. First, I am here in my capacity as chairman of the SBCA; and with your permission I would prefer to focus my remarks on those issues that are important to the entire industry. That said, I think it important to respond directly to your question. And in doing so——

Mr. BERMAN. Five years ago, you were representing EchoStar then?

Mr. MOSKOWITZ. That is correct.

In doing so, I think the first thing to keep in mind is that this same court found that EchoStar's practices for signing up new sub-

scribers for the past many years had been in full compliance with the requirements of the Act.

What we are talking about here are subscribers from a long time ago, from before EchoStar took this action itself and relied on third parties, as did everyone in the industry.

The second thing that I think is important to remember is the statute—the NAB did a great job. They got a statute that puts the burden of proof on satellite to prove every single one of its customers comply. And, what is more, it did an even better job, because they could make you do it, as they did in that case, more than 5 years after the customer was first signed up and records no longer existed.

So was the burden very difficult to meet? Absolutely, it was.

Did that same judge find that EchoStar was complying in its practices for signing up new subscribers for the past many years? Absolutely, he did.

So I think that we have shown that—and I think the other thing to keep in mind is it actually was EchoStar that went to the court initially and said we think our practices comply, but we want you to tell us whether they do or not. It wasn't the broadcasters who went into court initially to do that.

So we are doing our best to comply in an ever-changing field, and we think we have done a pretty good job of doing that. There are certainly older subscribers who have in retrospect become difficult, and we are continuing to work through that.

Mr. BERMAN. Thank you, Mr. Chairman.

Mr. SMITH. Thank you, Mr. Berman.

The gentleman from Alabama, Mr. Bachus, is recognized for his questions.

Mr. BACHUS. Thank the Chairman. And, Mr. Moskowitz, I am afraid I am going to ask you some additional questions, as opposed to other panel members. I almost wish I could ask somebody else a question.

How many of your subscribers are currently unable to receive the signal of their local network affiliate, either through an over-the-air signal or through satellite-provided digitized local signal? You can answer that as an association and then as EchoStar.

Mr. MOSKOWITZ. Congressman, I am afraid I do not have the specific statistics with me. I can look into it and get back to you with that information.

I can tell you that it is very difficult to determine what percentage of consumers in the United States get an off-air signal, most importantly because that standard is so antiquated as to change and really is in need of serious change. Certainly, the 1950s standard that was created isn't applicable in today's marketplace.

I believe that the percentage who have—well, certainly, the percentage who EchoStar can provide local channels by satellite is today a little over 85 percent of the entire U.S. Population; and I think with respect to DirecTV it is lower. We serve about 108 markets today. They serve about 70. They plan to increase that this summer to about the same number as us and perhaps even more.

Mr. BACHUS. But you are not sure—maybe in numbers, is there a million of those subscribers unable to receive the local signal from their local affiliate?

Mr. MOSKOWITZ. Right, I am sorry. There are certainly many millions who cannot receive their local channels by satellite, and they are probably at least—of EchoStar and DirecTV's customers today, I would estimate that there are well over a million who cannot receive their local channels today off air.

Mr. BACHUS. Okay. Over-the-air signal.

Mr. MOSKOWITZ. That is correct by today's standard. And if you updated that standard, the number would grow dramatically.

Mr. BACHUS. Now is that over a million, but it could be less than 2 million?

Mr. MOSKOWITZ. Yes. I believe it would be—again, using the definitions, not whether a consumer really can, because the fact of the matter is that a lot of times, while a consumer is predicted—I am talking about whether they are predicted to be able to receive the signal—in fact, because of ghosting and the antiquated standard, if you went to your neighbor's home, you might well find that they did not think they got an acceptable picture, but the law says they do. And by that standard it is probably between a million and two million of our customers today.

Mr. BACHUS. Okay. Assume you have a satellite customer on the edge of Washington, the Washington DMA, and say they are too far from D.C. to view our local stations over the air. Since EchoStar delivers ABC, CBS, Fox, all those channels, and you deliver those stations by satellite to everyone in the Washington, D.C., area, those same channels, in what respect is this household underserved by those networks?

Mr. MOSKOWITZ. I think, Congressman, that the fundamental issue is an issue of choice for the consumer. When the consumer can't get their local channels off air and therefore has to pay to receive them, we believe that the consumer ought to have a choice as to what they pay for.

Mr. BACHUS. A choice between a distant CBS affiliate and their locals?

Mr. MOSKOWITZ. That is right. Because they are now paying us for those channels. If the local broadcaster improved its plant and its power and added repeaters so that the local broadcaster could provide service, then there would be no issue.

Mr. BACHUS. Okay, let's say, in the Washington area, of your total charge—what is your average charge, say, in the Washington area, in an area I have just described, for all your package?

Mr. MOSKOWITZ. For our whole package, I think the average consumer pays approximately $50, give or take.

Mr. BACHUS. How many channels do they get?

Mr. MOSKOWITZ. For that, I think they probably get 150–170—about 170-plus channels.

Mr. BACHUS. How much are they paying for that ABC, CBS, Fox, and CBS station for that local?

Mr. MOSKOWITZ. They would be paying $5.99 for not only the ABC, NBC, CBS and Fox but also for the PBS and all of the independents. In Washington I think that amounts to 12 or 14 channels.

Mr. BACHUS. So maybe 10 or 12 percent of their bill, is that right?

Mr. MOSKOWITZ. Approximately.

Mr. BACHUS. Okay.

Could I ask one——

Mr. SMITH. Without objection, the gentleman is recognized for an additional minute.

Mr. BACHUS. Mr. Lee, let me just switch gears, for a minute. How much money have the broadcasters spent on the digital roll-out?

Mr. LEE. Congressman, I apologize. I do not have a clue. If our station is average, we are way up on the high side of a billion dollars.

Mr. BACHUS. Okay.

Mr. LEE. Our plant costs for digital so far have been about $14 million.

Now, we were lucky. We had—Mother Nature gave us a 3,500-foot mountain to put a 150-foot tower on so we didn't have to go out and build a 2,000-foot tower, and we had a spare standing there. So we are two or three million dollars lighter than a station that would have to put up a 2,000-foot tower.

Mr. BACHUS. How effective are you at serving your market with a digital signal?

Mr. LEE. That is a question better asked our viewers, but I think we are very effective, and maybe I can get some help from the distinguished gentleman from southwest Virginia over here. We operate at full power, have from day one.

The positioning statement of our television station is "Your hometown station." and I just could not see how we could put a digital signal on the air that served one community but not another. So we have been high definition from day one, we are multi-casting, we have HD carriage on cable in our market, we have, we are about to have multi-casting carriage on cable in our market. I think we have done it pretty damn well, if you will pardon me.

Mr. BACHUS. I will yield to the gentleman from western Virginia.

Mr. SMITH. The gentleman's time has expired.

The gentleman from Virginia, Mr. Boucher, is recognized for his questions.

Mr. BOUCHER. Well, thank you very much, Mr. Chairman. At the outset, Mr. Lee, I'm going to have to apologize and say I have yet to purchase a digital set——

Mr. LEE. Shame on you.

Mr. BOUCHER. —you and I can have a private conversation about my shortcomings in that respect at a later time.

Mr. LEE. I think Mr. Goodlatte gave himself one for Christmas.

Mr. BOUCHER. Well, he is a technological jump ahead of me.

Let me say welcome to each of these witnesses and thank each of you for your informative and often very spirited testimony here this afternoon.

I want to direct, first, several questions to Mr. Moskowitz; and let me begin by commending your particular company, EchoStar, for its performance in providing local-into-local services to more than 100 markets around the Nation. You have done better than the competition in that respect, and I think that your subscribers are well-pleased with the service they get.

Having said that, there are a total of 210 television markets across the country. And I would be interested in your observations

of what now needs to happen in order to expand dramatically the number of local markets that get local television signals delivered via satellite and what role is there for Congress to take additional steps?

A number of years ago Mr. Goodlatte and I partnered together and passed through the Congress a loan guarantee program that provides about $1.25 billion in Federal loan guarantees, a very large part of which has now been funded with appropriations that would encourage the construction and launch and operation of satellites, should that prove to be necessary, in order to extend the number of markets that are served with local-into-local service. As far as I know, that loan guarantee hasn't been drawn upon yet.

Just comment, if you would, about what the private sector intends to do in terms of expanding these services and what role, if any, there might be for us to take additional steps to help facilitate it.

Mr. MOSKOWITZ. Congressman, the satellite industry applauds your efforts to enact legislation that provides for the rural loan guarantees, and I think that there is an April 1st deadline for applications to be in, and I hope that we will find that many of our members attempt to take advantage of that opportunity. And that is one of the legs of the stool, is building more satellites, because today's satellites simply physically cannot handle adding many more local markets.

The second leg of the stool is we need more spectrum. There simply is not physically enough spectrum that we have been allocated so far in order to provide many more local markets. So I think that the thing that Congress can do is work with the satellite industry and the FCC to free up additional spectrum and make it available so that that, together with the—so that the technological questions can be addressed.

And then, of course, there are always the financial issues. And we are driven to provide competition in as many markets as is economically feasible and will continue to work hard to increase that number.

Mr. BOUCHER. Well, let me just ask you this. Let's suppose that we resolve whatever spectrum issues there are. Make a projection, if you would, 2 years from today, how many markets around the country do you think, you and DirecTV together are going to be serving?

Mr. MOSKOWITZ. If I had to project, I would say it would certainly be in excess of 150, and how far in excess of 150 is very difficult to say.

Mr. BOUCHER. Okay. Well, that's not the answer I was hoping to hear. And I think we have to do better. We can have some conversations about how to do that, but that is a major concern of mine in particular.

Your two-dish solution that EchoStar has for offering local signals in some markets has been challenged by the NAB. I think Mr. Berman had something to say about it also.

Let me ask you this. Is there any cost to the consumer to obtain that second dish in a market where the second dish is necessary to get the EchoStar-delivered local signals?

Mr. MOSKOWITZ. Thank you for asking. In fact there is absolutely no cost whatsoever to the consumer for that second dish. EchoStar absorbs that cost completely itself, and, moreover, the existence of the second dish is completely transparent to the consumer. So other than the fact that there is a second 18-inch dish up on the roof, when the consumer turns on his program guide, the channels that are on one dish or the other all appear contiguous in the program guide, and if you press a button to get one, you press the same button to get the other.

And, of course, the other thing we do is that we do inform all consumers of the availability of this free dish.

So we have chosen to try to serve more markets with local programming by satellite. And in order to do that, we have had to put some of these channels out of the wing slot. But we have done it in a manner which we believe makes it completely seamless to the consumer. And if they want that channel, it is absolutely available to them and they know that it is available to them at no cost.

Mr. BOUCHER. Thank you very much, Mr. Moskowitz.

Mr. Chairman, may I ask unanimous consent to proceed for one additional minute?

Mr. SMITH. Without objection, the gentleman is recognized for an additional minute.

Mr. BOUCHER. Thank you, Mr. Chairman.

Mr. Lee, I want to offer a special welcome to you as general manager of the television station that provides a tremendous service in the western part of Virginia. Your station serves approximately one-half of my district and at least that much of our Committee colleague, Bob Goodlatte's district. And we are very pleased to have you here today, and thank you for your testimony.

Mr. LEE. Thank you, Mr. Boucher.

Mr. BOUCHER. Let me ask you about two special circumstances that do prevail in my part of Virginia, the part of Virginia that you serve, and I know also prevail in a number of other areas around the Nation.

Circumstance number one is where a particular market has no affiliate of a given major network. What happens at the present time when that local market is uplinked to the satellite for local-into-local service, is that the subscribers to satellite within that market have the opportunity to subscribe to a distant network signal under the statutory license with respect to that particular network. But if there is an adjacent market that happens to be next door, right there within the same State that offers that affiliate, under current law there is no opportunity for that particular subscriber to subscribe to the network signal that happens to emanate from the adjacent market.

Should we not amend the law in order to make that adjacent market signal available through local-into-local uplink?

Mr. LEE. Mr. Boucher, I have wrestled with that question, and let me emphasize again, I am not an attorney so my reading of the law may be incorrect. But in studying some of this stuff last week in preparation for coming here, it occurred to me that it might be possible, let's say, in the Bluefield DMA, which would be part of your congressional district, but in which there is no local-into-local service, I can't find it in the law—can't find in the law a provision

that limits who DirecTV and EchoStar can import for distant network signals. It doesn't have to be New York or Los Angeles. If I read the law correctly, it could just as easily be Richmond or Charleston, West Virginia, or whatever.

But I would urge the Subcommittee staff to research that question further. That would be a very elegant solution. But I think the only downside for the DBS carriers would be they wouldn't be able to carry the local signals—they wouldn't be able to treat a Roanoke signal as a section 122 rate base. They would have to treat it as a section 119; pay distant signal copyright fees without regard for where it was coming from.

Mr. BOUCHER. Well, I think the proposal would be to treat it as a local signal, so that if it comes from an adjacent market it is treated as a local signal. You wouldn't have any objection to that, would you?

Mr. LEE. Oh, no, no. They would get a free ride that way, but I would have no objection at all.

Mr. BOUCHER. Let me ask about one other circumstance that——

Mr. SMITH. The gentleman is recognized for an additional minute.

Mr. BOUCHER. Thank you, Mr. Chairman. I appreciate your indulgence.

This situation prevails in one of my counties. It is Patrick County, Virginia, which has a very interesting natural geography. There is a very high mountain range that divides this county. The lower half of the county is where most of the population is, well below this mountain. And that area is adjacent to North Carolina. And under the Nielsen ratings, most of the residents of the county living down below this mountain are receiving their over-the-air and cable-delivered television from North Carolina, from Winston-Salem, North Carolina. However, the station that you operate is actually a little bit closer in terms of just raw miles to most of this population.

You are also within the same State, your market is adjacent to the market that, under the Nielsen ratings, most people are currently looking at in over-the-air TV. I am confident if you took a poll of the residents of this particular county, the vast majority would say they would much more prefer to receive the Roanoke market signals delivered in local fashion. But under the current law, they have to subscribe to that market which the Nielsen ratings say is most significantly viewed. And that is the Winston Salem market.

So I would very much like to see us change the law to say that in an instance like that, the in-State adjacent market could be uplinked and provided to a county in that kind of circumstance. I would welcome your comments about such an amendment should it be offered.

Mr. LEE. I know there are a number of counties around the country in which, with each annual Nielsen cycle, a county flip-flops back and forth between one DMA versus another. I have heard some talk about that phenomenon as to western Massachusetts, eastern New York, very much parallel to the State line phenomenon you and I are discussing. It really depends on whose ox is being gored.

The NAB does not yet have a position on that. The CBS Affiliates Group does not have a position on that. We recognize a solution needs to be found, and I would welcome an opportunity to work with you on that going forward.

Mr. BOUCHER. All right. Well, thank you very much Mr. Lee. I want to thank all the witnesses and, Mr. Chairman, I particularly thank you for your indulgence this afternoon.

Mr. SMITH. Thank you, Mr. Boucher.

The gentleman from Alabama, Mr. Bachus, is recognized for additional questions.

Mr. BACHUS. Thank you.

Mr. Moskowitz talked about this new digital white area license. Suppose the Congress creates such a license and there was a satellite provider, your company or one—another—a satellite provider gives a customer in this area a distant signal, say, from New York—Fox, NBC, ABC. And let's say at a local—at a later time, the local stations in Alabama expand their digital broadcasting and they reach into this area which you have called the digital white area. What would happen if at that time the subscriber had to give up his satellite-delivered digital stations and switch to using the over-the-air antenna to get the network stations? What do you think his reactions would be?

Mr. MOSKOWITZ. Well, first, we have tried to address that in our strategy, because every HD box satellite receiver that EchoStar builds, and many if not all of the HD receivers built by DirecTV as well, include an off-air digital tuner; so that while they could use the box to receive those digital distant network signals today, they would also have the inherent capability by putting up what hopefully at some point in time would be a small and unobtrusive off-air antenna to receive their local digital channels, when the local provider, the local station, upgrades its plan. The other very——

Mr. BACHUS. Well, what you are saying, at that time—what you are saying is at that time they wouldn't continue to get the distant network broadcast over satellite; right? That's—I am assuming that what you are asking us to do is temporarily give them that distant signal, but at such time that they get their local signal, that that service that they were getting would be withdrawn; right?

Mr. MOSKOWITZ. No, Congressman. We believe that while no new customer should receive it thereafter, that customers who get it already should be able to keep it as long as they also have the capability which we would assure of also receiving their local network channels.

Mr. BACHUS. Wouldn't that mean that a person, say—you know, on the same street, you would have some people that had—that could get it, other people that couldn't get it?

Mr. MOSKOWITZ. Yes. That would be a consequence of the fact that some broadcasters will adopt the technology and upgrade their plant more expeditiously than others will. We have that in analog today, where some consumers on the street are entitled to receive distant networks and others are not. The interesting thing about the digital is you either get it or not. So, unlike the analog, we don't expect there would be the same contentious issues, because

you can very simply determine whether somebody gets the signal or not.

Mr. BACHUS. I guess what I am saying, you could see a real problem with giving a customer a service and, all of a sudden, telling him he couldn't have it? That's not going to work, is it?

Mr. MOSKOWITZ. I believe that that would create problems that we would need to talk and work through.

Mr. BACHUS. If Congress created such a scheme, they would be basically setting themselves up for a firestorm of consumer protests down the road, wouldn't we?

Mr. MOSKOWITZ. If those channels were subsequently taken away from the small number of people who would adopt, then, yes. On the other hand——

Mr. BACHUS. You think it would just be a small number.

Mr. MOSKOWITZ. Well, I think it would depend on how quickly broadcasters met their promise to Congress and actually implemented the service that they promised when they were given the digital spectrum for free.

Mr. BACHUS. So you anticipate this digital white area just being a small number of people.

Mr. MOSKOWITZ. I believe that if you give this ability to satellite, that broadcasters will much more expeditiously meet their obligations, and therefore that number will be small.

Mr. BACHUS. But it will end up being small, but it would initially have been significant; right?

Mr. MOSKOWITZ. I am not sure I follow, Congressman.

Mr. BACHUS. Well, initially, if it were given initially you are saying, initially there would be a large number of people.

Mr. MOSKOWITZ. Well, the number of adopters early on is not great because there aren't—we have a chicken and an egg right now, where, you know, the broadcasters don't want to upgrade their plant because there aren't a lot of people with the TV sets to watch, and the manufacturers don't want to produce the sets in bulk and bring the price down because there is not a lot of content. Satellites, uniquely positioned, would provide that transition.

Mr. BACHUS. But that is not the fault of the broadcasters.

Mr. MOSKOWITZ. No, no, no. I am not saying it is.

Mr. BACHUS. That is really just the customers aren't—that is not really—I think you kind of cut to the essence of it, is that it is not the broadcasters' fault that people aren't receiving that signal now. The fault is that the public just isn't, you know, they are not investing in the set right now, as Mr. Boucher was a pretty good example of, or Mr. Bachus. You know, I mean, until I get all of my kids out of college, I am not investing in it.

Mr. MOSKOWITZ. But I agree with you completely. I am not saying that the NAB or the broadcasters are at fault in this respect. I am just saying that the adoption would occur more expeditiously.

Mr. BACHUS. But you know, of course, and they have also been required by Congress to come up with this, to do this expenditure which they are not getting much return for now. And if we require them to do that, and then at the same time turn around and let satellite providers provide a service, that is sort of adding insult to injury; is it not?

Mr. MOSKOWITZ. Well, I don't know. While I think the broadcasters have many good reasons why they have not, I think in large part the insult is that so few of them met the promise they made to meet the standard by 2002 and 2003. I think that to leave consumers behind when there is an option readily available to meet that——

Mr. SMITH. Would the gentleman like an additional minute?

Mr. BACHUS. I will just stop. But again, I think at least you have acknowledged that the reason the people aren't using the service is they don't have the TV sets. It is not that the signals aren't going out.

Mr. MOSKOWITZ. I think it is a combination of factors, and certainly that is one of them. Without a doubt, that is one of the big ones.

Mr. BACHUS. Thank you.

Mr. SMITH. Okay. Thank you, Mr. Bachus.

I thank the Members for their presence and the witnesses for their testimony today. It has been very informative. It is a little bit more of a controversial subject than perhaps we first realized, but we will get there, and there are some areas I think that we can agree on inevitably. I think we are moving toward reauthorization perhaps of 5 years, and we will talk about some of the details later on.

Thank you again, and we stand adjourned.

[Whereupon, at 5:22 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE HOWARD L. BERMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Mr. Chairman,

My very first hearing as Ranking Member of this Subcommittee, which occurred five years ago tomorrow, involved reauthorization of the section 119 satellite license. A lot has changed since then, but unfortunately, a lot has stayed the same.

The changes have been, for the most part, positive. While relevant stakeholders will air a wide variety of differences today, they appear to be united in praise of the section 122 local-into-local license Congress created in 1999. Five years ago, local-into-local satellite TV service functionally didn't exist. Today, 87% of U.S. TV households can receive local broadcast stations via satellite.

Whats more, it appears most households also have a choice between satellite TV providers. I understand that EchoStar provides local-into-local service to more than 83% of all U.S. TV households. By the end of this year, DirecTV will provide local-into-local service to 92% of all U.S. TV households.

The current availability of local-into-local satellite service is a pretty dramatic development in five year's time.

The growth of the satellite TV industry has been equally dramatic over the last five years. Satellite TV subscribership has nearly doubled in the last five years, from 13 million in 1999 to 22 million today. With 25% of multichannel video subscribers, satellite has become a truly formidable competitor to cable.

These dramatic changes show that the government subsidies embodied in the section 122 and 119 licenses have conveyed tremendous benefits to satellite TV providers and their consumers.

However, the situation is not so bright for those on whose backs these subsidies are levied. For copyright owners, much remains unhappily the same.

Royalties paid under the section 119 license for retransmission of distant broadcast signals have remained frozen for five years. In fact, they have remained frozen at deep discounts to 1999 marketplace rates. The statutory inflexibility of these rates is unique, and uniquely unfair. Virtually every other compulsory license that requires royalty payments includes a mechanism for increasing those payments.

Furthermore, the inflexibility of section 119 rates is totally inconsistent with marketplace realities. In voluntary negotiations over the past five years, satellite TV providers have agreed, often with vociferous reluctance, to provide markedly increased compensation to owners of copyrights in non-broadcast programming.

If the section 119 is to be reauthorized—and it appears a virtual certainly it will be—owners of copyrighted broadcast programming should be more fairly compensated.

In another example of how things remain the same, some satellite subscribers continue to receive a distant signal of a broadcast station despite the fact that they now receive a local signal of that broadcast via satellite. During our hearing nearly five years ago, I noted that such situations might arise, and questioned whether there was any justification for allowing them to exist. I continue to believe that compulsory licenses, including the section 119 license, should only countenance the minimal abrogation of copyright in order to accomplish their goals. If a satellite subscriber can receive a local broadcast via satellite, there appears to be no justification for abrogating copyright protection in order to provide that subscriber with a distant signal under the section 119 license.

While some of the problems we face today are identical to those we discussed five years ago, our witnesses will identify many entirely new issues. One issue of particular concern to me is the two-dish system employed by EchoStar. I understand that EchoStar relegates certain stations, like Univision, to a second dish, which may

violate the requirement that it carry all stations in a nondiscriminatory manner. Another new issue involves subscribers in one state who, due to the vagaries of the DMA definition, receive their local broadcast signal from another state. And there is the issue of whether the Grade B signal intensity standard will be useless in a future world of all digital broadcasts.

I do not mean to opine here and now on the appropriate resolution of these new issues. This hearing is only the first step in educating ourselves about these issues. However, I do believe the emergence of these new issues indicates the wisdom of reauthorizing section 119 on a temporary basis. New problems with the satellite licenses are bound to come up again, and as it does today, the looming expiration of the 119 license will give us an opportunity to address them.

Thank you, Mr. Chairman, and I yield back the balance of my time.

PREPARED STATEMENT OF THE HONORABLE BOB GOODLATTE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF VIRGINIA

Mr. Chairman, thank you for holding this important hearing on the reauthorization of the Satellite Home Viewer Improvement Act.

The reauthorization of this important statute provides Congress with the opportunity to continue to ensure that consumers in rural television markets have access to their local television station signals.

In 1999, Congress passed the Satellite Home Viewer Improvement Act (SHVIA), which allowed direct broadcast satellite providers to retransmit local television broadcast signals into the broadcast station's area. This law eliminated the legal barriers to the delivery of local TV via satellite. To date, the major satellite carriers have made significant progress toward offering local television signals via satellite to local television markets, and they have plans to expand the number of markets in which they will offer the service.

With this expansion, satellite dish owners, the majority of which live in rural areas, as well as medium and small cities and towns across the United States, will have access to their local news, sports coverage, weather, and emergency information. As this expansion continues to all 210 television markets, satellite service will continue to grow as an attractive, fully competitive television alternative for all Americans.

The reauthorization of SHVIA provides an opportunity for Congress to look back to the past five years to see what has worked and what has not. In addition, technological and industry advancements over the past five years pose new issues regarding the reauthorization, including whether to create a new quality standard for when a consumer is considered "unserved" for purposes of digital service, whether to reauthorize the compulsory license in section 119 of the Copyright Act at what rates and for how long, and many others.

I am eager to hear from the expert witnesses here today regarding these issues and regarding the progress that satellite carriers are making toward offering local-into-local service to all 210 markets. Thank you again Mr. Chairman for holding this important hearing.

LETTER FROM THE AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS (ASCAP), AND BROADCAST MUSIC, INC. (BMI)

March 8, 2004

The Honorable Lamar Smith
Chairman
Subcommittee on Courts, the Internet and Intellectual Property
Committee on the Judiciary
United States House of Representatives
Washington, D.C.

Re: Reauthorization of the Satellite Home Viewer Act

Dear Mr. Chairman:

The American Society of Composers, Authors and Publishers ("ASCAP") and Broadcast Music, Inc. ("BMI") write to set forth their views in regard to the reauthorization of the Satellite Home Viewer Act ("SHVA"). We appreciate your expression of willingness to address this issue, as you did during a hearing on February 24, 2004, and welcome the opportunity to participate in this most important process.

BMI and ASCAP represent close to 500,000 American songwriters, composers, lyricists and music publishers who create and own the copyrights to millions of musical works. On their behalf, ASCAP and BMI license the non-dramatic public performances of their musical works and distribute the license fees paid by the users for such performances in the form of royalties. In addition, through affiliation agreements with performing rights societies in other countries, BMI and ASCAP license the works of thousands of foreign writers and publishers. Accordingly, ASCAP and BMI seek to ensure that their member and affiliated writers and publishers are fairly compensated for the use of their works.

We have always believed that most compulsory licenses, such as the SHVA, fail to fairly compensate our members for the use of their copyrighted works. Compulsory licensing schemes remove perhaps the most fundamental basis of copyright protection – that of providing the copyright owner with the exclusive right to grant a license for a set term of years. Shifting this right to governmental hands limits – indeed severely impairs – the copyright owner's ability to receive a just price for the use of his or her work. It is

through the free marketplace, through willing buyers and sellers, that our members and affiliates recognize the true value of their performances. Only in the most extreme circumstances, and as a last resort when a free marketplace simply cannot function, should a compulsory license be considered.

BMI and ASCAP do not believe that the retransmission of broadcast television programming from distant markets by satellite carriers (or, indeed, by cable systems) presents such extreme circumstances. Our experience with the satellite (and cable) industries leads us to conclude that negotiating licenses in the free marketplace for the retransmission of distant broadcasts is simple and the obvious next step. Accordingly, it is our position that Congress should request the proponents of the satellite compulsory license to make a strong showing that an extension of the license serves the public interest. If that showing is not made by clear and convincing evidence, Congress should not reauthorize the SHVA.

Should Congress conclude that reauthorization of the SHVA is necessary, ASCAP and BMI would like to stress the need for increased royalty rates. As set out in the testimony of Fritz Attaway on February 24th, Congress in 1999 imposed a significant discount on the rate set by the independent Copyright Arbitration Royalty Panel. Since then, the rate has not increased. Taking into account ordinary inflation, reauthorization at the same rate would effectively decrease the rate over the ten-year period! Considering the already below fair market, keeping the rate at the current level would deprive creators and copyright owners of their just compensation from satellite carriers.

We do not take a position on the precise form and timing of the necessary rate increase. We do, however, share Mr. Attaway's view that rate increase and audit mechanisms are necessary. To that end, BMI and ASCAP will endeavor to work with your committee to reach a just solution.

Mr. Chairman, we are grateful for this opportunity to submit our thoughts on these issues. We hope to work with you, your Subcommittee, the Copyright Office and all other interested parties to create a system that works.

Please do not hesitate to contact us if you have any questions.

Sincerely,

Marilyn Bergman

Frances W. Preston

cc: The Honorable Howard Berman, Ranking Minority Member

LETTER FROM THE ASSOCIATION OF AMERICAN PUBLISHERS, INC. (AAP), AND THE SOFTWARE & INFORMATION INDUSTRY ASSOCIATION (SIIA)

ASSOCIATION OF AMERICAN PUBLISHERS, INC.

Software & Information
Industry Association
1090 Vermont Ave NW Sixth Floor
Washington, DC 20005-4095

February 10, 2004

The Honorable Lamar Smith
House of Representatives
Washington, DC 20515

Dear Chairman Smith:

On behalf of the Association of American Publishers (AAP) and the Software & Information Industry Association (SIIA), we would like to thank you for introducing H.R. 3632, the Anticounterfeiting Amendments of 2003. The bill as drafted, combats the increasing problem of counterfeited goods facing most American intellectual property industries. We would like to take this opportunity to express our support for the H.R. 3632 and urge that you consider adding "literary works," such as books, to the list of copyrighted works covered by the bill.

H.R. 3632 would explicitly cover motion pictures, sound recordings and software, but does not cover "literary works". Although not yet at the same level as the works covered by the bill, "literary works" suffer from the same counterfeiting problems and thus need to be covered by the bill. As you know, "literary works" are not currently included in 18 U.S.C. 2318 because, at the time of enactment, the piracy issues plaguing the software and other intellectual property industries regarding counterfeit labels did not, to a large extent, adversely affect the book publishing industry. Unfortunately, this is no longer the case. Print and electronic books are being pirated at an alarming rate, and publishers are finding it necessary to resort to the same kinds of anticounterfeiting protections that are used by other copyright industries. Adding "literary works" to the list of copyrighted works protected under this legislation would ensure that books and other literary works, including "ebooks", have the same protection as other types of intellectual property under Section 2318.

The Association of American Publishers is the national trade association of the U.S. book publishing industry. AAP's approximately 310 members include most of the major commercial book publishers in the United States, as well as smaller and non-profit publishers, university presses and scholarly societies. AAP members publish hardcover and paperback books in every field and a range of educational materials for the elementary, secondary, post-secondary and professional markets. Members of the Association also produce computer software and electronic products and services, such as online databases and CD-ROM.

The Software & Information Industry Association is the principal trade association of the software code and information content industry. Our 600 members are industry leaders in the development and marketing of software and electronic content for business, education, consumers and the Internet. SIIA's members are software companies, ebusinesses, and information service companies, as well as many electronic commerce companies. SIIA and its predecessor organization, the Software Publishers Association (SPA), have the longest-running digital anti-piracy program in existence. During the 17 years SIIA has been combating digital piracy we have gained invaluable experience as to what anti-piracy policies are effective and how to work with corporations and other organizations to ensure their compliance with U.S. copyright laws. SIIA has been a pioneer in developing the legal framework to protect intellectual property, and taking direct action to combat software and digital content piracy.

AAP and SIIA support your work and appreciate your commitment to protecting America's intellectual property. We have met with your staff, and would be happy to further discuss the matter with you. Thank you for your attention to this important matter.

Sincerely,

Patricia Schroeder
President & CEO

Ken Wasch
President

PREPARED STATEMENT OF THE ASSOCIATION OF PUBLIC TELEVISION STATIONS

Testimony of the Association of Public Television Stations Before the House of Representatives Subcommittee on the Courts, the Internet, and Intellectual Property Regarding the Extension of the Satellite Home Viewer Improvement Act

The Association of Public Television Stations ("APTS") hereby submits testimony before the House of Representatives Subcommittee on the Courts, the Internet, and Intellectual Property on the extension of the distant signal license under the Satellite Home Viewer Improvement Act of 1999 (SHVIA).[1]

As the Subcommittee considers legislation to extend SHVIA's satellite carrier distant signal license from its current expiration date of December 31, 2004 to a later date, it should be aware of two related issues of critical importance to the nation's public television stations that can be resolved through appropriate legislation.

- First, EchoStar continues to violate the spirit, if not the letter, of SHVIA by placing some public television stations and Spanish-language television stations on "wing satellites" that require the installation of a second dish on customer premises, thus illegally discriminating against those "disfavored" broadcasters – a practice that has been continuing for over two years.
- Second, while SHVIA's local carriage provisions address carriage of local analog stations on satellite, it is silent with regard to digital signals. As the nation's broadcast infrastructure migrates to digital distribution, it is vitally important that some degree of digital carriage be mandated on satellite pursuant to SHVIA.

[1] APTS is a nonprofit organization whose members comprise the licensees of nearly all of the nation's 357 CPB-qualified noncommercial educational television stations. APTS represents public television stations in legislative and policy matters before the Commission, Congress, and the Executive Branch and engages in planning and research activities on behalf of its members

A. Fixing the Wing Satellite Problem: Enhancing Access to Noncommercial and Spanish-Language Programming

Shortly after SHVIA's local-into-local mandatory carriage provisions came into effect in January of 2002, it became apparent that EchoStar had been placing some, but not all, local programming- including some local public television stations and Spanish-language stations- on "wing" satellites that were accessible by consumers only through the installation of an additional receiving dish. However, while EchoStar did not charge for the additional equipment and installation, it actively refused to promote the availability of such an option, and in many circumstances provided misleading information to consumers who requested the necessary equipment. The intent of this action was clear: to cherry-pick the most popular broadcast programming while providing restricted access to other programming in order to circumvent SHVIA's "carry one-carry-all" mandate.

On January 8, 2002, after an emergency petition was filed by the National Association of Broadcasters and others, the FCC's Media Bureau requested public comment on EchoStar's practice. Public Television and other broadcasters filed comments on January 23, 2002 objecting to EchoStar's practice requiring consumers to obtain a second dish to receive some local programming and argued that it violated the intent and spirit of SHVIA, which required nondiscriminatory carriage of all local stations if one local station is carried on satellite.

On April 4, 2002, the FCC's Media Bureau ruled that EchoStar's practice constituted illegal price discrimination, essentially imposing greater opportunity costs on consumers who wished to access certain kinds of programming. It also held that

EchoStar unlawfully failed to provide all local broadcast stations on contiguous channels and to provide nondiscriminatory access to all local broadcast stations on its electronic program guide. However, the Bureau emphasized that requiring installation of an additional dish to access some but not all stations was not inherently discriminatory. Rather, it only objected to EchoStar's particular implementation of its policy. The Bureau therefore required EchoStar to immediately remedy the discriminatory effects of its use of secondary dishes and report to the FCC at regular intervals concerning its compliance. The Bureau set forth a number of suggested remedies, the most prominent of which required EchoStar to better publicize and implement its free second dish offer. In a separate statement, Commissioners Copps and Martin objected that this remedy did not cut to the heart of the matter and suggested that the Bureau had acted beyond its authority, because the decision allowed EchoStar to remedy its discriminatory conduct merely through better publicity.

Public Television and other broadcasters subsequently petitioned the Commission to review this ill-founded decision. However, it has been nearly two years since the petitions were filed with no action from the FCC. On May 7, 2003 APTS and PBS urged the Commission to speedily resolve this issue and opposed the DIRECTV's most recent request to allow it to use wing satellites to carry local stations. On January 9, 2004, shortly after the approval of its merger with NewsCorp, DIRECTV announced that it would expand local service into 17 additional markets by placing local broadcasters on a second dish.[2]

[2] www.skyreport.com (January 9, 2004). Although DIRECTV plans on placing all local broadcasters on a second dish, thus potentially ameliorating any discriminatory effect, it does require local subscribers to purchase the additional dish.

Public television is significantly disadvantaged by this continuing, and discriminatory practice. In light of FCC inaction, the time for legislative intervention is now. Presently, 30 public television stations in markets throughout America are placed on wing satellites. A list of affected stations is attached to this testimony. Although EchoStar has been required to report on improvements in its outreach efforts regarding its free second dish offer, it has been impossible for either the FCC or the public to fully determine the success of its actions, because EchoStar refuses to publicly release the number of local subscribers who ask for a second dish and receive successful installation in comparison to the total number of local subscribers.

Public television urges the Subcommittee to consider legislation to ensure that satellite carriers providing local service to consumers should not discriminate against public broadcaster or Spanish-language broadcasters by placing these stations on hard-to-access wing satellites.

B. Digital Carriage on Satellite

Public Television is an enthusiastic proponent of digital television. With its higher quality images and sound, and its inherent flexibility to broadcast either a high-definition or multiple standard definition streams, along with additional streams of data, digital television gives public television stations new innovative tools to expand their educational mission in ways that were not possible in the analog world. For instance, public television stations are regularly producing new ***high-definition digital programming*** for national, regional and local distribution. In addition, ***multicasting*** will enable an expanded distribution of formal educational services, workforce development

services, children's programming, locally-oriented public affairs programming, and programming addressed to traditionally unserved or underserved communities. Lastly, public television stations also have plans to provide innovative, educational and public safety data services through "***datacasting***."[3]

In light of the significant public interest benefits of noncommercial educational digital services, public television respectfully requests that satellite companies such as DIRECTV and EchoStar be required to carry all free, over-the-air digital signals where local television stations are being carried pursuant to SHVIA. Carriage should include but not be limited to both high-definition programming and the value-added multicast digital programming currently being broadcast by the 234 public television stations now on the air with a digital signal.

First, digital carriage on satellite will aid in further speeding up the digital transition in this country. Analog broadcast television service is scheduled to be turned off at the end of 2006 unless 15% or more households cannot receive digital broadcast signals either over the air or through cable or satellite. Cable accounts for 67% of all households; satellite accounts for over 20% with significantly higher percentages in some markets. Over half of all satellite subscribers purchase a local package, and at least one satellite provider, DIRECTV, reports that 75% of its residential customers subscribe to the local package.[4] In light of these figures, it is vitally important that satellite subscribers have access to digital broadcast signals in order for the digital transition to be

[3] Datacasting involves the distribution of data files (e.g. maps, text, video or animation) over the air and can be directed either to the public at large or to a select portion of the public through subscription or other restricted technological means (e.g. encryption).

[4] Federal Communications Commission, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, FCC 04-5, note 297 (rel,. January 28, 2004).

a success within a reasonable period of time. In this regard, shortening the digital transition is especially important to public broadcasters, which must shoulder the substantial cost of dual analog-digital operations for an unknown period of time during the transition to digital.

Second, Congress has established the consistent federal policy that public television stations should have access to all telecommunications technologies, including satellite-delivered services.[5] Within the cable context, Congress explicitly concluded that "the Federal Government has a substantial interest in making all nonduplicative local public television services available" (a) because public television provides educational and informational programming to the nation's citizens, thereby advancing the Government's compelling interest in educating its citizens; (b) because public television stations are intimately tied to their communities through substantial investments of local tax dollars and voluntary citizen contributions; (c) because the Federal government has invested substantially in the public broadcasting system; and (d) because without carriage requirements there is a substantial likelihood that citizens, who have supported local public television services, will be deprived of those services.[6] The reasons for this policy apply with equal force, regardless of whether the public television station is broadcasting in either analog or digital format.

Lastly, satellite carriage of digital public television signals would help to preserve one of few remaining locally owned and operated media outlets in the digital age. In an

[5] Congress has stated, for instance, that "it is in the public interest for the Federal Government to ensure that all citizens of the United States have access to public telecommunications services through all appropriate available telecommunications distribution technologies." 47 U.S.C. § 396(a)(9).
[6] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992), Section 2(a)(8).

era of media consolidation, public television stations may represent the last true bedrock of locally controlled free, over-the-air media. The overarching purpose of public television stations is to serve the public interest by providing educational and informational services to their local communities. To that end, the 357 local public television stations that comprise the decentralized system of public broadcasting in this country are operated by local community foundations, colleges, universities, school districts and state commissions. In addition, many public television stations possess community advisory boards that provide direct feedback from the community regarding stations' performance of and adherence to public television's mission. Moreover, stations' daily business operations are directly funded by donations from local viewers, thereby ensuring community responsiveness in a very concrete financial way.[7] Local carriage of digital public television stations on satellite will promote localism and diversity in the media, will expand the reach of noncommercial educational services available to the public, and will also provide a further incentive for individual donations to public television stations.

The Subcommittee may hear from satellite carriers that they lack the capacity to rebroadcast the digital signals of each local station in each of the 210 local markets. However, DIRECTV itself has recently claimed that it will increase the amount of high definition television programming available to the public.[8] And recent technical

[7] In fact, one-quarter of Public Television's funding comes from individual donations, while only about 15 percent of funding comes from the Federal government. The balance is funded by local businesses, state and local governments, local colleges and universities, and foundations. See www.cpb.org/about/funding/whopays.html.

[8] See *General Motors Corp, Hughes Electronics Corp and New Corp Ltd Seek Approval to Transfer Control of FCC Authorizations and Licenses Held by Hughes Electronics Corp to the News Corp Ltd*, Public Notice, DA 03-1725 (May 16, 2003), p. 3. See also

submissions to the FCC have demonstrated that there are technologically feasible means to deliver digital signals via satellite despite any apparent capacity constraints.[9] Nevertheless, if mandated digital carriage on satellite systems pursuant to an amended version of SHVIA's carry-one-carry-all provision is not immediately possible, Congress may mandate as an interim measure that all satellite set-top boxes come equipped with integrated digital off-air tuners until the end of the DTV transition, after which full digital carriage would be required on all satellite systems providing local service. This approach would impose little or no burden on satellite carriers themselves, as some industry leaders – notably DIRECTV and Cablevision's Voom satellite service—are already providing this technology to their customers.

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For the above reasons, the Association of Public Television Stations urges the Committee to abolish the practice of segregating public television and other programmers to remote "wing" satellites and urges amendments to federal law to require local carriage of digital signals on satellite.

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http://www.directv.com/DTVAPP/imagine/HDTV.jsp, and Communications Daily, Satellite (June 5, 2003) (DIRECTV to add Discovery HD Theater, ESPN HD, HDNet and HDNet Movies).

[9] See Reply Comments of the National Association of Broadcasters, Federal Communications Commission, MB Docket No. 03-172 (Sept. 26, 2003); and Letter from Dianne Smith, Capitol Broadcasting Company to Marlene Dortch, Federal Communications Commission, CS Docket 98-120 and MB Docket 03-15 (January 22, 2004).

APPENDIX A

PUBLIC TELEVISION STATIONS THAT ARE BEING CARRIED BY ECHOSTAR ON A WING SATELLITE, February 19, 2004

Call	Station City	Station State	DMA Rank	DMA Name
WNYE	New York	NY	1	New York
WNJB	Warren	NJ	1	New York
WLIW	Plainview	NY	1	New York
KLCS	Los Angeles	CA	2	Los Angeles
KOCE	Huntington Beach	CA	2	Los Angeles
KVCR	San Bernardino	CA	2	Los Angeles
WYCC	Chicago	IL	3	Chicago
WYBE	Philadelphia	PA	4	Philadelphia
WNJS	Waterford	NJ	4	Philadelphia
KCSM	San Mateo	CA	5	San Francisco-Oak-San Jose
KRCB	Rohnert	CA	5	San Francisco-Oak-San Jose
WGBX	Boston	MA	6	Boston (Manchester)
WENH	Deerfield	NH	6	Boston (Manchester)
WHUT	Washington	DC	8	Washington, DC (Hagrstwn)
WNVC	Fairfax	VA	8	Washington, DC (Hagrstwn)
WPBA	Atlanta	GA	9	Atlanta
KBTC	Tacoma	WA	12	Seattle-Tacoma
WUSF	Tampa	FL	13	Tampa-St. Pete (Sarasota)
WEAO	Akron	OH	16	Cleveland-Akron (Canton)
WLRN	Miami	FL	17	Miami-Ft. Lauderdale
KBDI	Denver	CO	18	Denver
WBCC	Cocoa	FL	20	Orlando-Daytona Bch-Melbrn
WTBU	Indianapolis	IN	25	Indianapolis
WCVN	Covington	KY	32	Cincinnati
WNTV	Greenville	SC	35	Greenvll-Spart-Ashevll-And
WNED	Buffalo	NY	44	Buffalo
WKMJ	Floyd's Knob	IN	50	Louisville
KYNE	Omaha	NE	77	Omaha
KWBU	Waco	TX	92	Waco-Temple-Bryan
KRMJ	Grand Junction	CO	190	Grand Junction-Montrose